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REPORTS
OF
Cases Heard and Determined
BY THE
SUPREME COURT
OF
SOUTH CAROLINA

VOLUME CCXXXVII

CHARLES I. DIAL
SUPREME COURT REPORTER

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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME
WITH DATES OF COMMISSIONS

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CHIEF JUSTICE

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ASSOCIATE JUSTICES

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HON. G. DEWEY OXNER, February 1, 1944

HON. LIONEL K. LEGGE, March 31, 1954

HON. JOSEPH R. MOSS, January 25, 1956

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197345

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CHARLES I. DIAL,
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of South Carolina

17683

Woodrow GREEN, Respondent, v. John BOLEN, Appellant
(115 S. E. (2d) 667)

Action brought by one employed by one engaged in timber-logging operation as a sawyer and flagman, to recover from road builder who was constructing extension of log road under contract with plaintiff's employer, for injuries sustained when plaintiff was struck from behind by truck of defendant as plaintiff was giving signals to a skidder operator from log loading area. The action was brought on allegations that truck left usual path of travel and backed into loading area. The Common Pleas Court of Orangeburg County, J. Robert Martin, Jr., J., rendered judgment for plaintiff and defendant appealed. The Supreme Court, Moss, J., held that evidence on questions of truck driver's negligence and plaintiff's contributory negligence was for jury.

Affirmed.

1. **APPEAL AND ERROR.**—The question of whether there was error in refusing motions for nonsuit, directed verdict, judgment *non obstante veredicto* and alternatively for new trial requires consideration of testimony and reasonable inferences to be drawn therefrom in light most favorable to respondent.
2. **TRIAL.**—If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury; however if the evidence is susceptible of only one inference, the question is one of law for the court.
3. **AUTOMOBILES.**—In action, brought by one employed by one engaged in timber-logging operation as a sawyer and flagman, to recover from road builder who was constructing extension of log road under contract with plaintiff's employer, for injuries sustained when

plaintiff was struck from behind by truck of defendant as plaintiff was giving signals to a skidder operator from log loading area, maintained on allegations that truck left usual path of travel and backed into loading area, evidence on questions of truck driver's negligence and plaintiff's contributory negligence was for jury.

4. AUTOMOBILES.—Where action for injuries, sustained by plaintiff when he was struck by road builder's truck while road builder was engaged in extension of log road, was brought and tried entirely on theory of common-law negligence and there was no mention of any violation of uniform traffic code, court properly refused to charge that usual statutes governing traffic upon highways and streets were inapplicable for reason that accident occurred upon private road. Code 1952, § 10-1210.

Messrs. Thomas R. Wolfe, Julian S. Wolfe and Fred R. Fanning, Jr., all of Orangeburg, for Appellant, cite: As to the negligence of the Plaintiff, in standing with his back to the truck, being the proximate cause of the accident: 202 S. C. 73, 24 S. E. (2d) 121; 253 S. W. (2d) 615; 23 So. (2d) 822. As to ordinary traffic rules being inapplicable where accident occurred upon private lands: 202 S. C. 160, 24 S. E. (2d) 177.

Marshall B. Williams, Esq., of Orangeburg, for Respondent, cites: As to there being ample evidence that Defendant's truck driver was negligent in failing to exercise reasonable care in the operation of the truck, and that Plaintiff was not guilty of contributory negligence: 231 S. C. 28, 97 S. E. (2d) 73; 195 S. C. 150, 10 S. E. (2d) 330; 143 S. C. 223, 141 S. E. 375; 198 S. C. 445, 18 S. E. (2d) 326; 138 S. C. 281, 136 S. E. 218. As to trial Judge properly refusing Defendant a new trial: 228 S. C. 144, 89 S. E. (2d) 97.

July 14, 1960.

Moss, Justice. “”

This action was brought by Woodrow Green, the respondent herein, against John Bolen, the appellant herein, to recover damages for personal injuries sustained on November 18, 1958, by the backing of a truck owned by the appellant and operated at the time by his agent. The complaint alleges that the respondent was an employee of one Fogle, who was

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engaged in a timber-logging operation in Pocatigo Swamp in Clarendon County, South Carolina, and the appellant, a road builder, was constructing an extension of a log road into the swamp under a contract with Fogle. It appears that the appellant had previously constructed a log road approximately 680 feet in length, and that Fogle had set up his logging operation at a point on the road approximately 600 feet in the swamp, which area the appellant had prepared and filled to a greater width than the other portions of the road in order that such area could be used for log loading. It is alleged in the complaint that it was necessary for the logging road to be extended further into the swamp area, and that the appellant began hauling dirt from the hill into the swamp for this purpose. In hauling the dirt along the logging road, the trucks of the appellant passed through the log loading area where a rig tree was located on the opposite side of the road from the log skidder, and a cable ran from the rig tree across the road to the skidder. When the logs were being pulled out of the swamp, the cable would be tight and approximately twenty feet above the road. When logs were not being pulled out of the swamp, the cable would be slack and would lie in the road.

The duties of the respondent required him to be in the loading area and log bed where he was sawyer and flagman, transmitting signals from the log crew in the woods to the skidder operator. The respondent was struck by a truck of the appellant as he was giving signals to the skidder operator from the loading area. The respondent was standing with his back in the direction from which the truck of the appellant was being backed along the road.

The complaint alleges that while the respondent was performing his duties as aforesaid, that an employee of the appellant, while backing a dump truck along the road being extended, left the usual path of travel and backed into the loading area, knocking the respondent down and running over him with the right rear dual wheels of said truck. The complaint alleges that as a result of the operation of said

dump truck in a negligent, careless, reckless, willful and wanton manner, the respondent's left thigh and left leg bone from the knee to the ankle were crushed. He had multiple rib fractures on the left side, internal injuries, and a crushed left kidney, with numerous abrasions and bruises about his chest, abdomen and face. The complaint alleges that the injuries sustained by the respondent were permanent and disabling.

The answer of the appellant contained a general denial and also alleged as a defense that the injury to the respondent was caused and occasioned by his sole and contributory negligence, carelessness, recklessness and wantonness.

This case was tried before the Court of Common Pleas for Orangeburg County and resulted in a verdict for the respondent for actual damages. At appropriate stages of the trial, the appellant moved for a nonsuit and a directed verdict on the grounds, (1) That the testimony was insufficient to require the submission of the issue of negligence on the part of the driver of the truck to the jury; (2) That the injury to the respondent was due to and caused by his own negligence; and (3) That the only reasonable inference that can be drawn from the testimony is that the respondent was guilty of contributory negligence. These motions were refused. This case was submitted to a jury and a verdict was returned in favor of the respondent for actual damages. After the verdict was returned, the appellant moved for judgment *non obstante veredicto*, or failing in that, for a new trial upon numerous grounds. The motion was refused and this appeal followed.

The first question for determination is whether the trial Judge erred in refusing the motions of appellant for a nonsuit, directed verdict and judgment *non obstante veredicto*, and, alternatively for a new trial, upon the grounds heretofore stated.

- The question of whether or not there was error in
1, 2 refusing the motions of the appellant for a nonsuit,
directed verdict, judgment *non obstante veredicto*,

1]

and alternatively for a new trial, requires us to consider the testimony and the reasonable inferences to be drawn therefrom in a light most favorable to the respondent. *Padgett v. Colonial Wholesale Distributing Co.*, 232 S. C. 593, 103 S. E. (2d) 265; *Critzer v. Kerlin*, 231 S. C. 315, 98 S. E. (2d) 761. If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. *Scott v. Southern Ry. Co.*, 231 S. C. 28, 97 S. E. (2d) 73. However, if the evidence is susceptible of only one reasonable inference, the question is no longer one for the jury but one of law for the Court. *Cannon v. Motors Ins. Corp., et al.*, 224 S. C. 368, 79 S. E. (2d) 369. Ordinarily, contributory negligence is an issue for the jury; *Young, et al. v. Parker*, 224 S. C. 35, 77 S. E. (2d) 288; and it rarely becomes a question of law for the Court. *Mock v. Atlantic Coast Line R. Co., et al.*, 227 S. C. 245, 87 S. E. (2d) 830.

In *Peagler v. A. C. L. Railroad Co., et al.*, 234 S. C. 140, 107 S. E. (2d) 15, 17, we said:

"It is a well established rule of law that in passing upon the appellants' motions below, it is incumbent upon this Court to review the testimony, construing it in the light most favorable to the respondent. *Barnett v. Charleston & Western Carolina Ry. Co.*, 230 S. C. 525, 96 S. E. (2d) 555, and *Brown v. Powell*, 198 S. C. 403, 18 S. E. (2d) 212. It has also been held that if the only reasonable inference to be drawn from all the testimony is that the negligence of the complainant is a direct and proximate cause of his injury and damage, or that the negligence of the complainant contributed as a direct and proximate cause, then it would be the duty of the trial Judge to order a nonsuit or direct a verdict against such plaintiff. *Sewell v. Hyder*, 229 S. C. 480, 93 S. E. (2d) 637.

"In the case of *Field v. Gregory*, 230 S. C. 39, 94 S. E. (2d) 15, we quoted with approval from the case of *Harri-son v. Atlantic Coast Line R. Co.*, 196 S. C. 259, 13 S. E. (2d) 137, 141, the following:

“It is firmly established in this jurisdiction that if the inferences properly deducible from the evidence are doubtful, or if they tend to show both parties guilty of negligence or wilfulness, and there may be a fair difference of opinion as to whose act produced the injury complained of as a direct and proximate cause, then the question must be submitted to the jury. *Ford v. Atlantic Coast Line Railroad Co.*, 169 S. C. 41, 168 S. E. 143.’”

3 The evidence shows that the respondent was employed by one Fogle as a sawyer and a flagman. At the time he was struck and run over by the truck of the appellant, he was flagging the skidder by relaying to such skidder signals given to him by men in the swamp from which logs were being pulled. The respondent was standing in a loading area or log yard where the roadway was twenty-two feet wide. There is testimony that he was some two feet outside of the usual traveled portion of an eleven foot road over which the truck of the appellant was traveling. There is testimony that the driver of appellant's truck saw the respondent standing on the left side of the road as he was driving the truck loaded with dirt. At this time the truck driver was driving his truck forward and he reached what is described as the turn around point and began to back the truck through the loading area, where the respondent was engaged in his duties as a flagman, with his back in the direction from which the truck was backing. There is testimony that the truck driver was supposed to get a signal from the skidder operator before backing the truck through the loading area, but on the occasion when the respondent was injured, no signal was given by the skidder operator before the truck driver began to back through the loading area, and the skidder operator never saw the truck until after it struck the respondent. The truck driver testified that he had a signal to proceed in his backward movement. There is also testimony that the truck, in backing through the loading area, left the path of travel usually used in the backward movement, and backed into

1]

the area where the respondent was working, and it was there that the truck ran over him. It was also testified that if the truck had stayed in the usual road traveled by it, the respondent would not have been struck. It was also testified that the driver of the truck backed the same down the road and into the loading area while observing only the left side of the road as he performed such backing operation. The respondent, at the time of such backing movement, was on the opposite side of the road from the side of the road being observed by the truck driver, and the presence of the respondent in the loading area, and on the opposite side of the road from that being observed by the truck driver, was known to said truck driver.

There is evidence from which the jury could have concluded, as it probably did, that the driver of the truck of appellant, while backing such truck into the area where the logging crew was pulling logs from the swamp, and while the respondent was signaling the skidder operator, seeing the cable attached to the log taut some twenty feet above the road, proceeded the backing movement through the area before the log arrived at the loading area and the cable became slack. There was evidence from which the jury could have also concluded that the truck of the appellant left the usual path of travel by said trucks and struck the respondent who had no warning or notice that such truck was approaching from his rear. The evidence is subject to the construction that the respondent was so absorbed in the performance of his duties, with his attention focused upon the area he was required to keep under observation, and was at such time oblivious to the fact that the truck of the appellant was proceeding backwards toward him; and no signal was given to the truck driver which permitted the backward movement of the truck to commence. Likewise, it is reasonably inferable from the testimony that the respondent was standing outside of the path of travel normally used by the truck in making its backward movement, and that such truck veered from such normal path and ran over the respondent without any signal of approach being given.

In the case of *Butler v. Temples*, 227 S. C. 496, 88 S. E. (2d) 586, 588, this Court said:

"Moreover, it is well-established upon reason and authority that the backing of a motor vehicle is attendant with unusual danger to one who may be in its path and requires commensurate care on the part of the operator of the vehicle. 5 Am. Jur., Automobiles, Secs. 328 *et seq.* Annotations, 67 A. L. R. 647 and 118 A. L. R. 242. Blashfield, Secs. 1101, 1102. *Carroll v. Lumpkin*, 146 S. C. 178, 143 S. E. 648. *Benedict v. Marks Shows*, 178 S. C. 169, 182 S. E. 299. * * *" See also *Chesser v. Taylor, et al.*, 232 S. C. 46, 100 S. E. (2d) 540.

The case of *Daughtry v. Cline*, 224 N. C. 381, 30 S. E. (2d) 322, 154 A. L. R. 789, was an action brought to recover damages for personal injuries alleged to have been sustained by the negligence of the defendant in backing a truck over the plaintiff, while engaged in the construction of a taxiway, wherein actionable negligence was denied and a plea of contributory negligence interposed. It appears that the plaintiff, while engaged as a civil engineer by the government, and while he was "squatting down" to determine a level on a taxiway, that a sprinkler truck of the defendant, who had the contract for the construction of a taxiway, backed the said truck over the plaintiff from his rear. The North Carolina Supreme Court, in holding that there was no error in failing to grant a nonsuit on the ground of contributory negligence of the plaintiff, said:

"There are a number of cases which hold that where a plaintiff is so absorbed in the performance of his duties as to render him oblivious of danger, and this obliviousness to danger is apparent, or should, in the exercise of due care, have been apparent to the defendant, the defendant is thereby charged with the duty of using due care to avoid injuring the plaintiff, and the plaintiff is not guilty of such contributory negligence as would bar him from recovery against the defendant for not exercising due care to protect himself from the danger which was obvious or should, in the exer-

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cise of due care, have been obvious to the defendant. *Moore v. Atlantic Coast Line R. Co.*, *supra*; *Davis v. Southern R. Co.*, 175 N. C. 648, 96 S. E. 41; *Lassiter v. Raleigh & G. R. Co.*, 133 N. C. 244, 45 S. E. 570; *Brown v. Southern R. Co.*, 144 N. C. 634, 57 S. E. 397."

This Court has held that if the inferences properly deducible from the evidence are doubtful or if they tend to show both parties guilty of negligence, and there is a fair difference of opinion as to whose act produced the injury complained of as a direct and proximate cause, then the question must be submitted to the jury. *Field v. Gregory*, 230 S. C. 39, 94 S. E. (2d) 15, and the cases therein cited. We have also held that it is not possible to lay down any definite rule by which to determine whether the question of contributory negligence is to be found under the evidence as a conclusion of law, or should be submitted to the jury as a question of fact. The determination of the question is necessarily controlled by the facts and the circumstances of the particular case. The Court will not decide it as one of law if there is conflict in the testimony or if the conclusions to be drawn therefrom are doubtful and uncertain. Under these circumstances the question is clearly one for the jury. *Robinson v. Atlantic Coast Line R. Co.*, 179 S. C. 493, 184 S. E. 96.

We conclude, under the factual showing made in this case, that the trial Judge was correct in refusing the motions of the appellant for a nonsuit, directed verdict, and for judgment *non obstante veredicto*, on the ground that the testimony was insufficient to require the submission of the issue of negligence on the part of the appellant to the jury. He was also correct in refusing these motions on the ground that the testimony conclusively showed that the injury to the respondent was due to and caused by his own negligence or his contributory negligence. All of these questions were properly submitted to the jury.

The other question for determination is whether the
4 trial Judge committed error in refusing, at the request of the appellant, to instruct the jury "that the usual

statutes governing traffic upon highways and streets are not applicable here for the reason that this accident occurred upon what is known as a private road."

It appears that after the trial Judge had delivered his charge to the jury, that he temporarily excused the jury, pursuant to Section 10-1210 of the 1952 Code, and gave opportunity to counsel for the parties to this action to express objections to the charge as made or to request additional charges. It was then that the appellant requested the Court to make the charge above quoted.

We have held that instructions to the jury should be confined to the issues made by the pleadings, and an instruction based on an issue not raised by the pleadings is erroneous. *Citizens Bank of Darlington v. McDonald, et al.*, 202 S. C. 244, 24 S. E. (2d) 369. We have also held that the failure to instruct on issues not before the jury is not error. *Richey v. Southern Ry. Co.*, 69 S. C. 387, 48 S. E. 285. We have also held that sound legal principles, whether embraced in decisions of the Court or statutes, should be charged by a trial Judge only when applicable to the case on trial. *Durant v. Stuckey*, 221 S. C. 342, 70 S. E. (2d) 473.

We have carefully reviewed the pleadings and the testimony in this case and find neither allegation nor evidence to which the foregoing instruction could be applicable. The complaint and the testimony reveals no mention of any violation of the uniform traffic code. This case was brought and tried entirely upon the theory of common law negligence. Since there was no issue in this case concerning the violation of any statutory traffic regulation, there was no error committed by the trial Judge in refusing the requested charge.

In 53 Am. Jur., Trial, Section 574, at page 452, it is said:

"It is a well-settled general principle that the instructions given by the trial court should be confined to the issues raised by the pleadings in the case at bar and the facts developed by the evidence in support of those issues or admitted at the bar. In other words the particular matters to be covered

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in the instructions depend upon the issues joined by the pleadings and supported by the evidence. Both the plaintiff and the defendant are entitled to have issues of fact presented by the pleadings submitted to the jury without the introduction of extraneous matter which may mislead them or divert their minds from a consideration of the evidence pertinent to the real issues. No instruction should be given by the court either on its own motion or at the request of counsel which tenders an issue that is not presented by the pleadings or supported by the evidence, or which deviates therefrom in any material respect. * * *

In the case of *Wright v. Harris*, 228 S. C. 144, 89 S. E. (2d) 97, 98, this Court said:

"The foregoing is in line with other decisions of this Court to the effect that it is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial. *Thomson v. Sexton*, 15 S. C. 93. Conflicting and irrelevant instructions constitute reversible error. *Citizens Bank of Darlington v. McDonald*, 202 S. C. 244, 24 S. E. (2d) 369; and a trial Judge ought to take care not to confuse the jury by charging them on legal principles which are inapplicable to the case on trial. *Jennings v. Clearwater Manufacturing Company*, 171 S. C. 498, 172 S. E. 870."

The issues upon which the trial Judge is required to instruct are only those which are raised by the pleadings and the evidence. There was no duty on the trial Judge to instruct the jury as requested by the appellant because such charge was not applicable to any issue in this case.

We conclude that the exceptions of the appellant should be overruled and the judgment below affirmed.

Affirmed.

STUKES, C. J., and TAYLOR and LEGGE, JJ., concur.

OXNER, J., concurs in result.

OXNER, Justice (concurring in result).

I am in full accord with the views expressed on the first question but would assign a different reason for the conclusion reached on the last question.

Just before the charge there was a discussion, in the absence of the jury, between the trial Judge and counsel as to the applicability of certain statutory traffic regulations embodied in respondent's request to charge. The trial Judge ruled that these regulations were not applicable since the accident occurred on a private road or driveway but there was no request by appellant's counsel that he give an instruction to that effect.

At the conclusion of the charge, appellant's counsel asked that the jury be instructed "that the usual statutes governing traffic upon highways and streets are not applicable here for the reason that this accident occurred upon what is known as a private road." The trial Judge indicated that he would have given an instruction to this effect if it had been timely requested but did not think it should be emphasized by giving it after he had concluded his charge.

An instruction along the line requested would not have been improper. It is true that the violation of the statutes regulating the operation of motor vehicles on the highway was not made an issue in the case yet it is common knowledge that many of the jurors are familiar with these regulations and the question of their applicability might easily arise during their deliberations. There are many occasions when it is helpful to a jury to give an instruction that certain principles of law are not applicable. To illustrate, where self-defense is invoked to excuse a homicide occurring on defendant's premises, it is not uncommon in charging the various elements of that defense for the court to tell the jury that the defendant is not required to retreat although no contention thereabout was made during the trial. So here it would not have been error to charge the jury that the statutes regulating the operation of motor vehicles on the highway were not applicable. But I do not think it was reversible error to refuse a request to this effect when first

made at the conclusion of the charge, particularly when there had been a full discussion of the subject between court and counsel before the charge was commenced.

STUKES, C. J., concurs.

17685

PIEDMONT SHIRT COMPANY, Appellant, v. AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, Respondent.
(115 S. E. (2d) 499)

Employer's action against labor union which had been attempting to organize employees, for injunctive relief against certain complained of activities. The County Court of Greenville County, William B. McGowan, J., rendered judgment dismissing action, and an appeal was taken. The Supreme Court held that there was at least an area of legitimate argument or controversy as to whether matters presented fell within provisions of National Labor Relations Act relating to unfair labor practices so as to require court to yield jurisdiction to National Labor Relations Board, and court would dismiss proceedings.

Affirmed.

LABOR RELATIONS.—There was at least an area of legitimate argument or controversy as to whether matters presented in employer's action against union which had been attempting to organize employees, wherein employer alleged that union had been unlawfully picketing retailers of employer's products and conducting boycott in effort to have employer put pressure upon its employees to join union contrary to their wishes, seeking injunctive relief against complained-of practices, fell within provisions of National Labor Relations Act relating to unfair labor practices, and court was required to yield jurisdiction to National Labor Relations Board and dismiss proceedings. National Labor Relations Act, §§ 7, 8(a) (3), (b) (2), (4), (A, B) as amended 29 U. S. C. A. §§ 157, 158(a) (3), (b) (2), (4), (A, B).

Messrs. Price & Poag, of Greenville, and Blakeney, Alexander & Machen, of Charlotte, North Carolina, for Appel-

lant, cite: As to the complaint stating a common-law cause of action in tort over which the courts of this State have jurisdiction and it should not have been dismissed on any theory of Federal pre-emption: 9 A. L. R. (2d) 228, 232; 212 S. C. 156, 46 S. E. (2d) 673; 196 S. C. 19, 12 S. E. (2d) 39; 190 S. C. 392, 3 S. E. (2d) 38; 184 S. C. 449, 192 S. E. 665; 226 S. C. 430, 85 S. E. (2d) 729, certiorari denied 349 U. S. 953, 75 S. Ct. 881, 99 L. Ed. 1277; 225 S. C. 29, 80 S. E. (2d) 343; 213 S. C. 445, 49 S. E. (2d) 841.

Messrs. John Bolt Culbertson, of Greenville, and Jacob Sheinkman, of New York, for Respondent, cite: As to the National Labor Relations Board having primary and exclusive jurisdiction over this controversy: 359 U. S. 236; 348 U. S. 468; 346 U. S. 485; 353 U. S. 1; 353 U. S. 20; 359 U. S. 236; 358 U. S. 270; 225 F. (2d) 205, cert. denied 350 U. S. 914; 228 F. (2d) 553, cert. denied 351 U. S. 963; 43 L. R. R. M. 2156, cert. granted 359 U. S. 965; 263 F. (2d) 796; 191 F. (2d) 65; 208 F. (2d) 444; 262 F. (2d) 617; 264 F. (2d) 642; 204 F. (2d) 848, affirmed 347 U. S. 501; 119 N. L. R. B. 307; 119 N. L. R. B. 320; 121 N. L. R. B. 86; 121 N. L. R. B. 1176, cert. denied; 4 L. Ed. (2d) 118; 122 N. L. R. B. 105; 125 N. L. R. B. 20; 121 N. L. R. B. 1439; 269 F. (2d) 694; 168 Ohio St. 560, 157 N. E. (2d) 101, cert. denied; 4 L. Ed. (2d) 77; 181 Kan. 775, 317 P. (2d) 349; (Tex.) 309 S. W. (2d) 834; 247 N. C. 620, 101 S. E. (2d) 800; (Tex.) 324 S. W. (2d) 83; (Mo.) 325 S. W. (2d) 50; 185 Kan. 183, 341 P. (2d) 989; 228 F. (2d) 384, cert. denied; 351 U. S. 950; 127 N. E. (2d) 203, cert. denied 350 U. S. 900; 276 N. W. 281, 11 N. E. (2d) 910; 34 N. Y. S. (2d) 184; 94 N. Y. S. (2d) 62. As to the acts complained of being a valid exercise of free speech guaranteed by the United States Constitution, First and Fourteenth Amendments; Constitution of the State of South Carolina; Article I, Section 4 of the National Labor Relations Act as amended, Sections 8 (c) and 7, and are therefore not cognizable by

the Courts: 357 U. S. 513; 341 U. S. 494; 257 U. S. 184; 339 U. S. 470; 310 U. S. 469; 310 U. S. 88; 356 U. S. 341; 336 U. S. 490; 354 U. S. 284; 308 U. S. 147; 355 U. S. 313; 197 S. C. 303, 15 S. E. (2d) 678; 234 S. C. 89, 106 S. E. (2d) 918.

July 18, 1960.

PER CURIAM.

The order of Honorable W. B. McGowan has been carefully considered in the light of the record and the exceptions, and we find no error.

Let the order be reported as the judgment of this Court.

The order of Judge McGowan follows:

In this proceeding the plaintiff seeks the injunctive relief of this Court with the view of restraining the defendant, its agents and representatives, from further practicing upon it the tortious acts imputed to it, its agents and representatives, by the complaint.

Substantially it is alleged that the plaintiff has its principal place of business in the City and County of Greenville, State aforesaid, where it manufactures on a large and profitable scale "Wings" and "Kaynee" shirts for men and boys, which are distributed and sold throughout the country.

It is further alleged that the defendant, as an unincorporated labor organization, through its agents and representatives, for some time in various parts of the country, has been unlawfully picketing the retailers of the plaintiff and conducting a boycott of plaintiff's products, and that as a result of said activities of the defendant, its agents and representatives, the plaintiff has suffered and is threatened with serious and irreparable loss and damage, for the redress of which it has no adequate relief at law.

It is further alleged that the defendant, having been unable to organize the plaintiff's employees, announced that it would subject the plaintiff to the said practices now being

employed unless the plaintiff would comply with the defendant's demands that the plaintiff apply pressure upon its employees to join the defendant union and should recognize the union as the duly selected bargaining agent of said employees, even though not the fact and contrary to the wishes of said employees. That the plaintiff refused to do so and, thereupon, the defendant by and through its agents and representatives, launched and entered upon the execution of said unlawful practices.

There can be no doubt but that under the common law the alleged conduct of the defendant is tortious in character, with the corresponding course of action in favor of the plaintiff or injunctive relief therefrom. However, at the outset, the defendant by special appearance questions the jurisdiction of this Court to entertain the matter on the theory of pre-emption arising from consideration of the Taft-Hartley Act.

Much has been said and written by the Courts on this subject, the latest having been the case of *San Diego Building Trades Council, etc. v. Garmon*, 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. (2d) 775, wherein most of the former decisions touching upon the question are reviewed.

There it was declared, in the absence of violence or intimidation, that where the conduct complained of and sought to be regulated in the State Court arguably falls within the compass of Sections 7 and 8 of said Act, 29 U. S. C. A. §§ 157, 158, relating to protected activities and certain prohibited unfair labor practices, the State Court, before taking hold, must stand aside and yield jurisdiction to the National Labor Relations Board for determination of that primary question.

In the present case there is no allegation of violence or intimidation and hardly could be said arbitrarily that the tortious conduct laid to the defendant does not fall within the scope of said two sections or either of them. At least an area of legitimate argument or controversy is presented

there. In this connection, see sub-sections (b) (2), (a) (3), (b) (4) (A) and (b) (4) (B) of Section 8 of the Act relating to unfair labor practices. Also the question arises whether the peaceful picketing for the purposes alleged in the complaint falls within the protection of Section 7 of the Act.

In deference to the *Garmon case*, considered by this Court as controlling, this Court feels that it is required to relinquish and dismiss the within proceedings for lack of jurisdiction.

It follows that the temporary restraining order issued herein falls for the same reason.

It is so ordered.

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Greswold GWYNETTE, L. O. Field, Ben Goodale, Fred E. Pearman, Eugene E. Stone, W. S. Smith, J. K. Earle, Jr., R. P. Knapp and W. L. Harrelson, Commissioner of Agriculture, constituting and as the State Dairy Commission, Appellants, v. J. S. MYERS, d/b/a Kash and Karry, Respondent.

(115 S. E. (2d) 673)

Action by State Dairy Commission to enjoin retail grocer from selling Grade-A milk at price below minimum price fixed by Commission for area as a controlled market. The County Court, Greenville County. W. B. McGowan, J., sustained demurrer to complaint, and Commission appealed. The Supreme Court, Legge, J., held that the business of selling milk was not affected with the public interest, regulation of milk prices was beyond state's police power, and statute which purported to give State Dairy Commission power to regulate retail prices was to that extent unconstitutional.

Affirmed.

OXNER, J., dissented.

1. CONSTITUTIONAL LAW.—To fix the price at which the owner of a thing may sell it is, to that extent, to deprive him of his property,

for one's ownership of property consists not only of his right to possess it, but also of his right to use it as he pleases, to sell it at his own price, and to give it away if he wishes to do so.

2. **CONSTITUTIONAL LAW.**—The right of a citizen to engage in a lawful business, to make contracts, and to dispose of his property is not absolute; it is subject to regulation and control by the state in the exercise of its police power, but that power, though an essential attribute of sovereignty, is not absolute, and may be exercised only for the protection of the public in its health, safety, morals, or general welfare.
3. **CONSTITUTIONAL LAW—FOOD.**—The business of selling milk is not affected with a public interest, regulation of milk prices is beyond the state's police power, and statute which purported to give State Dairy Commission power to regulate milk prices was to that extent unconstitutional. Act April 27, 1953, and § 10, 48 St. at Large, pp. 279, 286; Act May 11, 1955, 49 St. at Large, p. 496; Const. art. 1, § 5.
4. **CONSTITUTIONAL LAW.**—Whether the private status of a business, with its attendant freedom from regulation, has changed into one in which the public has such an interest as to justify its regulation by the State is always a matter for judicial inquiry, and the mere declaration by legislature that a business is affected with a public interest is not conclusive of such inquiry. Const. art. 1, § 5.
5. **CONSTITUTIONAL LAW.**—The extent to which a business affected with a public interest may be regulated by the State is not a matter solely within the legislative discretion, but depends upon the nature of the business, the feature that touches the public, and on the abuses reasonably to be feared. Const. art. 1, § 5.
6. **CONSTITUTIONAL LAW—FOOD.**—State regulation of the preparation of food may be justified when directed to the health of those employed in that business, or to the health of the public, but may not be extended to the fixing of wages or prices in that industry. Const. art. 1, § 5.
7. **CONSTITUTIONAL LAW.**—The state may not dictate prices in a private industry merely because the industry is large and important or because the public may be concerned in respect of its maintenance, but such control is justifiable under the police power only when the industry is affected with a public interest in the sense that it may fairly be said to have been devoted to the public use. Const. art. 1, § 5.

Messrs. Daniel R. McLeod, Attorney General, and James S. Verner, Assistant Attorney General, of Columbia, for Appellant, cite: As to Act No. 255 of the 1955 Acts not depriving the Respondent, a retailer of milk, of its property

without due process of law nor denying him the equal protection of the law, contrary to Section 5, Article 1, of the Constitution of this State: 37 S. E. (2d) 241, 207 S. C. 500; 290 U. S. 169, 78 L. Ed. 247; 67 S. E. (2d) 692, 208 Ga. 561; 336 U. S. 525, 69 S. Ct. 657, 93 L. Ed. 865; 291 U. S. 502, 78 L. Ed. 940, 89 A. L. R. 1469; 300 U. S. 608, 81 L. Ed. 835; 77 S. E. (2d) 798, 224 S. C. 150; 66 S. E. (2d) 33, 219 S. C. 485; 99 S. E. (2d) 665; 2 S. E. (2d) 36, 191 S. C. 271; 17 S. E. (2d) 524; 198 S. C. 225; 94 S. E. (2d) 177, 230 S. C. 75; 68 S. E. (2d) 334, 220 S. C. 414; 88 S. E. (2d) 683, 227 S. C. 538; 291 U. S. 502; 107 S. E. (2d) 36, 234 S. C. 103; 22 Am. Jur., Food, p. 865; 101 A. L. R. 646; 119 A. L. R. 245; 155 A. L. R. 1383; 103 S. E. (2d) 923, 233 S. C. 161; 94 S. E. (2d) 177, 230 S. C. 75; 103 S. E. (2d) 762, 233 S. C. 67; 103 S. E. (2d) 14; 88 S. E. (2d) 67, 227 S. C. 339; 310 U. S. 32, 84 L. Ed. 1061. *As to the order of the Dairy Commission, in declaring the Greenville-Spartanburg milk marketing area a controlled market, and fixing the minimum wholesale, retail and producer prices not unconstitutionally depriving the Respondent of his property:* 77 S. E. (2d) 195, 223 S. C. 526; 68 S. E. (2d) 44, 220 S. C. 469; 220 S. C. 414, 68 S. E. (2d) 334; 163 Va. 957, 179 S. E. 507; 300 U. S. 608, 81 L. Ed. 835; 249 N. C. 658, 107 S. E. (2d) 631. *As to the Order of the Appellant, declaring the controlled market for the Greenville-Spartanburg area, not being violative of Section 34, Article III, of the Constitution, prohibiting the enactment of local or special laws:* 195 S. E. 539, 186 S. C. 290; 137 S. C. 266, 135 S. E. 60; 103 S. E. (2d) 923, 233 S. C. 161; 132 S. C. 241, 128 S. E. 172; 300 U. S. 608, 81 L. Ed. 835; 163 Va. 957, 179 S. E. 507. *As to Respondent's alleged lack of representation on the Commission not being a valid objection:* 24 S. E. (2d) 15; 60 S. E. (2d) 35, 191 Va. 1; 44 S. E. (2d) 88, 211 S. C. 77; 300 U. S. 608, 81 L. Ed. 835. *As to the 1955 Act, and the Order of the Commission, not unconstitutionally depriving the Respondent of his free-*

dom of contract: 58 S. E. (2d) 332, 216 S. C. 382; 172 S. E. 130, 171 S. C. 209; 158 S. E. 833, 160 S. C. 477; 107 S. E. (2d) 36, 234 S. C. 103; 309 U. S. 310, 84 L. Ed. 775; 340 U. S. 179, 95 L. Ed. 190; 12 Am. Jur. 421; 341 U. S. 105, 95 L. Ed. 788; 72 S. E. (2d) 66, 222 S. C. 169.

Messrs. Price & Poag, of Greenville, for Respondent, cite: As to the Dairy Commission Act, and the Order of the Commission thereunder, being unconstitutional: 231 S. C. 636, 99 S. E. (2d) 665; 5 Utah (2d) 326; 30 Pac. (2d) 741. *As to decisions of the United States Supreme Court not being binding here*: 231 S. C. 636, 99 S. E. (2d) 665; 67 S. E. (2d) 692, 208 Ga. 561. *As to the due process and equal protection clauses of the Constitution being violated*: 208 Ga. 561, 67 S. E. (2d) 692. *As to retail stores selling milk being given no recognition*: 319 S. W. (2d) 511. *As to recitals in Act not amounting to legislative findings of fact, but being simply arguments presented by that body as to the necessity for the Act*: 231 S. C. 636, 99 S. E. (2d) 665.

Messrs. Nelson, Mullins & Grier, of Columbia, for South Carolina Milk Producer Associations as Amicus Curiae, cite: As to the production and distribution of milk being a matter intimately related to the public health and welfare, and subject to reasonable regulation by the legislature in the exercise of its undoubted police powers: 336 U. S. 525, 69 S. Ct. 657, 93 L. Ed. 865; 163 Va. 957, 179 S. E. 513; 203 S. C. 276, 17 S. E. (2d) 223; 207 S. C. 500, 37 S. E. (2d) 241. *As to construction of Statutes when question of constitutionality is raised*: 191 S. C. 19, 3 S. E. (2d) 686; 177 S. C. 427, 181 S. E. 481. *As to Act No. 255 of the 1955 Acts of the General Assembly clearly meeting every constitutional test, and it should be upheld*: 209 S. C. 19, 39 S. E. (2d) 133.

July 26, 1960.

LEGGE, Justice.

The State Dairy Commission, having issued an order declaring the Greenville-Spartanburg market area a "con-

trolled market" and fixing minimum prices to be charged for milk by producers, distributors and retailers in that area, brought this action to enjoin the defendant, a retail grocer of Greenville County, from selling Grade A milk at a price below that so fixed. It appeals from a judgment of the Greenville County Court sustaining a demurrer to its complaint.

The Act of April 27, 1953 (48 Stat. at L. 279), as its preamble shows, was designed to prevent milk of inferior quality being brought into South Carolina from other states during periods of short production of local milk. It divided the state into three zones and provided for the creation of a nine-member State Dairy Commission constituted as follows: one producer from each zone, to be appointed by the Governor from two nominated by the producers in that zone; one distributor from each zone, owning and operating there a milk processing and distributing plant, to be appointed by the Governor from two nominated by the distributors in that zone; two "consumers" appointed by the Governor; and the Commissioner of Agriculture. It forbade the importation of milk into this state for fluid distribution without a permit from the Commission; and it authorized the Commission to make rules and prescribe sanitary standards to be complied with before shipment of milk into this state, "in order to protect the health of the people of South Carolina by guaranteeing a pure supply of milk." Section 10 declared that "nothing contained in this act shall be construed as giving the State Dairy Commission the power to fix, prescribe or control the price or classification of milk or dairy products produced in the State of South Carolina."

The Act of May 11, 1955 (49 Stat. at L. 496) broadened the scope of the Commission's functions and vastly increased its power, giving to it "the authority to supervise and regulate the entire Grade-A milk industry of the State of South Carolina including the production, purchase, transportation, handling, consignment, processing, manufacture, storage,

distribution, bailment, delivery, disposal and sale of milk, cream and milk products in any marketing area in the State of South Carolina." Among other things, it purported to vest in the Commission power, after a public hearing, to declare a state of emergency to exist in any marketing area (to be then designated a "controlled market"), and thereupon to fix the minimum prices to be charged for milk in such area by producers, distributors and retailers.

The complaint in the instant case alleged, *inter alia* :

That the defendant, operating a large retail store in Greenville County, does not advertise his business by radio, television or newspaper publicity, but instead offers to the public certain "loss-leader" items, among them half-gallon units of milk at thirty-seven cents per unit, which is fourteen cents per unit less than the price charged by other retail merchants and chain stores in the Greenville area, and ten cents per unit below the cost to the defendant; and also quart units at nineteen cents, or seven cents less than the general retail price in that area and five cents less than they cost him; and that as the result of such merchandising efforts over the past several years he has built up a very large business.

"4. That the sale of milk as above stated by the defendant has caused much concern to other retail and chain stores handling milk in the area, which, in order to meet competition, will necessarily have to reduce the price of milk sold by them to a competitive figure, which they have threatened to do and were threatening to do and some were doing prior to the issuance of the Orders of the Commission hereinafter referred to.

"5. That the employees of the Dairy Commission have heretofore called upon the defendant several times and explained to him that his method of operation would certainly disrupt the whole milk market, result in the lowering of prices by his competitors to a point which would cause loss to all parties, and would eventually cause the lowering of milk prices to such extent as to affect and ruin the producers or dairy farmers of South Carolina, who have a great in-

vestment in the business and are without sufficient capital to stand any prolonged price war, which would force them to sell their dairy cattle, close their dairies, and result in the people of South Carolina once more becoming dependent upon foreign sources of supply, at whatever prices such suppliers might charge.

"6. That because of the activities of this defendant, which have existed for years and which he has refused to discontinue after several discussions and requests by the Commission so to do, and because of an imminent price war resulting from his activities as well as the activities and threats of others involved in other phases of the milk business in the market, a public hearing was held in Spartanburg, South Carolina, on the 14th day of July, 1959, after full and proper notice had been given to the public and to all others interested in any and all phases of the milk business. At this hearing some 300 individuals attended and considerable testimony was taken upon the threatening conditions existing in the market and the necessity of price-fixing, the Commission finding that an emergency existed justifying the exercise of its price fixing powers in the Greenville-Spartanburg market, which has been designated by the Commission as Controlled Market No. 1 and consists of these counties: Abbeville, Anderson, Cherokee, Greenville, Greenwood, Laurens, Oconee, Pickens, Spartanburg and Union.

"7. That thereafter the Commission declared the Greenville-Spartanburg market area a controlled market and passed Orders fixing the minimum wholesale, retail and producer prices to be charged for various units of milk by all sellers and buyers of milk, these Orders becoming effective September 1, 1959; the defendant being notified prior to that time to apply for a permit, and of the other requirements of the Orders applicable to him. The prices fixed by these Orders were those generally prevailing at the time in the area and neither raised nor lowered prices, except as to those who were selling as was defendant and others generally conducting activities such as his.

"8. That despite full information and knowledge of the laws, regulations and action of the Commission, upon information and belief, the defendant, on September 1, 1959, through his employee F. H. Vaughn, sold one half-gallon of Grade-A homogenized milk for thirty-seven cents to James A. Merck and threatens to continue such sales at such prices although the minimum price set and fixed by the Commission for such a unit of milk by its Order is set at fifty-one cents."

The primary ground of the demurrer is that the price-fixing provisions of the Act and of the Commission's orders issued by virtue thereof deny the defendant the due process and equal protection guaranteed by Article 1, Section 5 of the Constitution of South Carolina. Stated otherwise, the question is: May the State fix the price at which a retail grocer may sell milk?

To fix the price at which the owner of a thing may
1 sell it is, to that extent, to deprive him of his property; for one's ownership of property consists not only of his right to possess it, but also of his right to use it as he pleases, to sell it at his own price, and to give it away if he wishes to do so. *Rogers-Kent, Inc., v. General Electric Co.*, 231 S. C. 636, 99 S. E. (2d) 665.

The right of a citizen to engage in lawful business, to
2 make contracts, and to dispose of his property, is not absolute; it is subject to regulation and control by the state in the exercise of its police power. But that power, though an essential attribute of sovereignty, is also not absolute; it may be exercised only for the protection of the public in its health, safety, morals or general welfare. *Gasque, Inc. v. Nates*, 191 S. C. 271, 2 S. E. (2d) 36.

Involved here is no question of public health, safety
3 or morals. The issue, as before stated, concerns only the asserted right of the state to fix the minimum price of milk at retail. Beyond doubt, the state has power to regulate and control the price that one in private business

may charge for goods or services where such business is "affected with a public interest." *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. That, conversely, it may not fix prices in a business not so affected, is manifest not only from the fact that the police power is concerned with public, not private, welfare, but also for the reason that such governmental intermeddling with business essentially private in nature is repugnant to the fundamental concept of free enterprise.

The term "affected with a public interest" is not susceptible of precise definition. In *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 43 S. Ct. 630, 634, 67 L. Ed. 1103, the court classified businesses clothed with a public interest as follows: (1) those operating under a public grant of privileges expressly or impliedly imposing the affirmative duty of rendering a public service upon demand of any member of the public, *e. g.* common carriers and public utilities; (2) certain exceptional occupations which from the early days of the common law have been considered as affected with a public interest, *e. g.* those of operators of inns, cabs, and grist-mills; and (3) those which, though not at their inception, may be fairly said to have been devoted by their owners to the public use. With reference to the third of these classes, the following is clear from that decision:

1. Whether or not the private status of a business,
 4 with its attendant freedom from regulation, has changed into one in which the public has such an interest as to justify its regulation by the state, is always a matter for judicial inquiry; the mere declaration by the legislature that a business is affected with a public interest is not conclusive of such inquiry.

2. The extent to which a business affected with a
 5 public interest may be regulated by the state is not a matter solely within the legislative discretion. "It depends on the nature of the business on the feature which touches the public, and on the abuses reasonably to be feared."

3. State regulation of the preparation of food may
6 be justified when directed to the health of those employed in that business, or to the health of the public; it may not be extended to the fixing of wages or prices in that industry.

In *Williams v. Standard Oil Co.*, 278 U. S. 235, 49 S. Ct. 115, 116, 73 L. Ed. 287, 60 A. L. R. 596, the court, declaring that Tennessee was without power to fix prices at which gasoline might be sold, said:

"It is settled by recent decisions of this court that a state Legislature is without * * * power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property * * * is 'affected with a public interest.' * * * By repeated decisions of this court, beginning with *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. * * * Negatively, it does not mean that a business is affected with a public interest merely because it is larger or because the public are warranted in having a feeling of concern in respect of its maintenance."

See also *New State Ice Co. v. Liebmann*, 285 U. S. 262, 52 S. Ct. 371, 374, 76 L. Ed. 747, where the asserted power of Oklahoma to control the business of manufacturing and selling ice was denied, the court declaring that business to be "as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor", and that "the production or sale of food or

clothing cannot be subjected to legislative regulation on the basis of a public use."

For more than half a century after the decision in *Munn v. Illinois* the courts of this country, state and federal, recognized and accepted the principle that a state may not constitutionally fix prices in a private industry not "affected with a public interest." In more recent years, with the spread of the paternalistic tendency to more and more governmental control of private business, that principle has by some courts been ignored or repudiated. In *Nebbia v. People of State of New York*, 291 U. S. 502, 54 S. Ct. 505, 515, 78 L. Ed. 940, 89 A. L. R. 1469, the court, by a five to four decision, upheld a New York statute that vested the Milk Control Board with power, among other things, to fix the minimum price to be charged by a retail grocer for milk sold for consumption off the premises. The price-fixing order there was occasioned by a surplus supply of milk and was designed to prevent smaller distributors, who did not have to carry large quantities of surplus milk, from underselling larger distributors not so fortunately situated. The majority opinion, conceding that the dairy business was neither, a public utility, nor a monopoly, nor a franchise grantee, declared that "the phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good." And again, that "'affected with a public interest' is the equivalent of 'subject to the exercise of the police power.'" The minority opinion, rejecting this view as both unsound and contrary to long-established precedent, declared:

"Regulation to prevent recognized evils in business has long been upheld as permissible legislative action. But fixation of the price at which A, engaged in an ordinary business, may sell, in order to enable B, a producer, to improve his condition, has not been regarded as within legislative power. This is not regulation, but management, control, dictation—it amounts to the deprivation of the fundamental right which

one has to conduct his own affairs honestly and along customary lines. The argument advanced here would support general prescription of prices for farm products, groceries, shoes, clothing, all the necessities of modern civilization, as well as labor, when some Legislature finds and declares such action advisable and for the public good. This Court has declared that a state may not by legislative fiat convert a private business into a public utility. *Michigan Public Utilities Comm. v. Duke*, 266 U. S. 570, 577, 45 S. Ct. 191, 69 L. Ed. 445, 450, 36 A. L. R. 1105; *Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583, 592, 46 S. Ct. 605, 70 L. Ed. 1101, [1104] 47 A. L. R. 457; *Smith v. Cahoon*, 283 U. S. 553, 563, 51 S. Ct. 582, 75 L. Ed. 1264, [1272]. And if it be now ruled that one dedicates his property to public use whenever he embarks on an enterprise which the Legislature may think it desirable to bring under control, this is but to declare that rights guaranteed by the Constitution exist only so long as supposed public interest does not require their extinction. To adopt such a view, of course, would put an end to liberty under the Constitution."

In *Reynolds v. Milk Commission of Virginia*, 163 Va. 957, 179 S. E. 507, the court, dividing four to three, upheld the licensing and price-fixing provisions of the statute creating the Virginia Milk Commission so far as said provisions and the Commission's orders pursuant to them related to distributors. The majority opinion, leaning upon the *Nebbia* case as authority for the view that the milk industry may be regulated, even to the extent of fixing prices, if the public interest demands it, declared nevertheless that to uphold the issues in the case before it did not require commitment of the court to the broad views expressed by the author of the majority opinion in the *Nebbia* case. See also *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835, where the Virginia statute was upheld by a divided (five to four) court.

In *H. P. Hood & Sons v. Du Mond*, 336 U. S. 525, 69 S. Ct. 657, 93 L. Ed. 865, the court, again dividing five to

four, struck down, as violative of the Commerce Clause, a New York statute under which the Commissioner of Agriculture and Markets of that state had refused to issue to the appellant, a Massachusetts corporation engaged in distributing milk to the inhabitants of Boston, and having three receiving depots in New York, a license to establish an additional receiving plant, the Commissioner's refusal being upon the ground that issuance of the license would tend to disrupt the economy of other plants in the New York area, to deprive local markets of adequate supply during the short season, and to result in destructive competition in a market already adequately served. It reaffirmed, however, the view of the majority in the *Nebbia case*, that price-fixing for the protection of producers and distributors of milk is within the powers of a state over its internal commerce.

Following the *Nebbia* decision, the courts of many states have declared valid their statutes creating bureaus for the control of the milk industry and vesting in them power not only to regulate in the interest of the public health, but also to fix prices for the benefit of that industry. Cf. *State Board of Milk Control v. Newark Milk Co.*, 118 N. J. Eq. 504, 179 A. 116; *Noyes v. Erie & Wyoming Farmers Co-operative Corp.*, 281 N. Y. 187, 22 N. E. (2d) 334; *State v. Auclair*, 110 Vt. 147, 4 A. (2d) 107; *Savage v. Martin*, 161 Or. 660, 91 P. (2d) 273; *Schwegmann Brothers Gaint Super Markets v. McCrory*, 237 La. 768, 112 So. (2d) 606. See also *State ex rel. North Carolina Milk Commission v. Galloway*, 249 N. C. 658, 107 S. E. (2d) 631, upholding an order of the North Carolina Milk Commission prescribing a uniform hauling charge per cwt. to be paid to each producer delivering milk to Biltmore Dairy Farms, a processor and distributor, regardless of the volume of milk so delivered or the distance from Biltmore's plant.

- Deeply embedded in our concept of constitutional government is the principle that the state may not dictate prices in a private industry merely because it is large
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and important or because the public may be concerned in respect of its maintenance, and that such control is justifiable under the police power only when the industry is affected with a public interest in the sense that it may fairly be said to have been devoted to the public use. To that principle we adhere, agreeing with the opinion of the minority in *Nebbia v. People of State of New York*, *supra*, which reaffirmed it. The majority opinion in that case, however conclusive as to applicable provisions of the Federal Constitution, does not control us in the interpretation of the Constitution of this state, under which the issue here arises. *Rogers-Kent, Inc. v. General Electric Co.*, *supra*.

It is common knowledge that milk is an essential food; that it is highly perishable in nature; that its wholesomeness is a matter of concern to the public health; that the production and distribution of wholesome milk involves costly sanitary requirements; and that the milk industry in South Carolina is a large and important one. But these characteristics, however they may justify or require governmental regulation for the protection of the people's health, do not render the business so affected with a public interest that as to it the state may prescribe prices for sales by retail stores. Similar characteristics are present in other industries of great importance to this state, e. g., the raising and marketing of beef cattle, the processing and distribution of meat, the growing and marketing of grain, of vegetables, and of fruits, and the handling, processing and sale of fish and other sea foods. Those industries, no less than that concerned with the production and distribution of milk, contribute substantially to the prosperity of this state; and their maintenance is thus a matter in which the people properly have an interest. But, like the milk industry, they are essentially *juris privati*; and we do not think that they may fairly be characterized as "devoted to a public use." Cf. *Wolff Packing Co. v. Court of Industrial Relations*, *supra* [262 U. S. 522, 43 S. Ct. 633, 67 L. Ed. 1103]. It has never been suggested in this state that the economic security of those engaged in them may be assured by legislative or bureaucratic price-fixing.

The right of the state to regulate and control the production and distribution of milk with regard to sanitation and purity is not in question. The only provision of the Act that is challenged here is that which purports to empower the Commission to dictate to a retail grocer the minimum price at which he may sell wholesome milk that he has purchased from a distributor at the latter's price. In our opinion the police power of the state does not extend so far. We are in accord with the view expressed in *Harris v. Duncan*, 208 Ga. 561, 67 S. E. (2d) 692, 694, where the court, declaring unconstitutional a similar provision of the Georgia Milk Control Law, said:

"While we recognize that milk is an essential food and that a constant and sufficient supply is desirable, or even necessary, yet the same may be said of meat and bread. To let down the barriers of our Constitution and take away the right of contract by seller and purchaser as to milk, might well be applied to other food products. Once the constitutional barrier against infringement upon the right of free contract is down, and the gates become open to products because of their universal use by the public and its concern for a constant and adequate supply thereof, other products such as gasoline, oil, tobacco, clothing, and similar articles could well be the subject for price fixing."

An "emergency" in the Greenville-Spartanburg area is alleged in justification of the Commission's price-fixing orders. Analysis of the complaint discloses as the factual basis for declaration of an emergency nothing more or less than that the defendant, a retail grocer, in order to attract customers to his store, has for several years been selling milk below the retail price prevailing in the Greenville-Spartanburg area; that this has caused "much concern" to other retail merchants in the area, some of whom have reduced and others of whom "will necessarily have to reduce the price of milk sold by them to a competitive figure;" that this practice "would eventually cause the lowering of milk prices to such extent as to affect and ruin the producers

or dairy farmers of South Carolina * * * and result in the people of South Carolina once more becoming dependent upon foreign sources of supply * * *." There is no suggestion that any producer or distributor has yet been forced to reduce his price a penny as the result of the defendant's "loss-leader" practice; nor is it suggested that the defendant or any other retailer in the area is presently unwilling to pay the price now being charged by the distributors or is buying from out-of-state sources. Upon the facts alleged, the "emergency" would seem more fancied than real

We reject the thought, suggested by the allegations of the complaint just quoted, that the "emergency" contemplated by the Commission was the possibility of importation from other states of milk more cheaply purchased, and that the price-fixing orders were designed to protect local economic interests from interstate competition. For such a purpose would not support the orders in question even under the view that a state may fix prices in the milk industry within its borders. As Mr. Justice Cardozo, speaking for a unanimous court in *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 497, 500, 79 L. Ed. 1032, 101 A. L. R. 55, said of a provision in the New York Milk Control Act purporting to forbid the sale in that state of milk bought outside unless the price paid to the producer was one that would be lawful upon a like transaction within the state:

"Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. * * * Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents."

Another reason shuts our ears to the cry of "emergency" in this case. An emergency, however it may furnish occasion for the exercise of existing power, does not itself create

power. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 26 A. L. R. (2d) 1378. The Commission, being without power to fix prices before the alleged emergency, acquired no potency in that field because of it.

Affirmed.

TAYLOR and MOSS, JJ., concur.

OXNER, Justice (dissenting).

While the question is a difficult one, I am not persuaded beyond a reasonable doubt that our Constitution forbids the legislature from controlling the price at which milk may be sold. We have repeatedly said that every presumption will be made in favor of the constitutionality of a legislative enactment and that a statute will be declared unconstitutional "only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." *Moseley v. Welch*, 209 S. C. 19, 39 S. E. (2d) 133, 137.

The preamble to the Act reads:

"Whereas, approximately ninety per cent of the fluid milk sold in the United States is either under state or federal price control; and,

"Whereas, all states bordering on South Carolina have some control over milk pricing, the following findings of fact with respect to the dairy industry are hereby made:

"1. Milk is referred to by all authorities on human nutrition as 'nature's most nearly perfect human food.'

"2. Because of its highly perishable nature, its production and distribution have been surrounded by more costly sanitary requirements than those of any other commodity.

"3. Milk cannot be kept in constant and adequate supply for consumers unless the high cost of maintaining these sanitary precautions is returned to producers.

"4. Dairy farming fits logically into our modern agricultural diversification program and is contributing substantially to the agricultural and industrial stability of the State.

"5. The perishable nature of milk, the necessity for immediate disposition and delivery by the producer, the seasonal effects on production, and the variations in consumption, make it advisable to find markets and use in seasons of excess production, and to take such steps as are found expedient to stabilize the industry in areas affected by adverse conditions.

"6. The present Dairy Commission does not have the power to prevent price wars, unfair trade practices and chaotic marketing conditions with their attendant consequences to producers, distributors and consumers.

"7. The General Assembly finds that the enactment of this legislation will be of benefit to the producers, distributors and consumers of dairy products and the public generally."

The foregoing facts are presumptively correct and must be accepted if the law-making body could have rationally believed them to exist. *Richards v. City of Columbia*, 227 S. C. 538, 88 S. E. (2d) 683; *Mills Mill v. Hawkins*, 232 S. C. 515, 103 S. E. (2d) 14.

It is apparent from the foregoing findings that the Legislature concluded that the milk industry is affected by elements of instability peculiar to the business, necessitating special control, and sought to invoke the police power for the protection of the health, safety and welfare of the general public, as well as the welfare of those engaged in the milk industry.

Legislation having the same paramount purpose has been enacted in a number of States and sustained by every court that has considered it except one. The first decision was *People v. Nebbia*, 1933, 262 N. Y. 259, 186 N. E. 694. In that case the Court upheld a New York statute drastically regulating the milk industry, including the price at which milk might be sold by stores to consumers. The enactment of this legislation resulted from an extensive legislative investigation which disclosed destructive and demoralizing com-

petitive conditions and unfair trade practices in the milk industry causing the income of the farmers to be reduced below the cost of production and endangering the supply of pure and wholesome milk. This decision was affirmed by the United States Supreme Court in *Nebbia v. People of State of New York*, 1934, 291 U. S. 502, 54 S. Ct. 505, 510, 78 L. Ed. 940, 89 A. L. R. 1469. It was there held that the price fixing features of this statute did not constitute a denial of the equal protection of the laws or due process guaranteed by the Fourteenth Amendment. Mr. Justice Roberts, speaking for the majority of the Court, pointed out that neither property rights nor contract rights are absolute and that the guaranty of due process "demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." In the course of the opinion, it was said: "We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago." The Court concluded: "If the law-making body within its

sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

In *H. P. Hood & Sons v. Du Mond*, 336 U. S. 525, 69 S. Ct. 657, 660, 93 L. Ed. 865, it is said: "Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests has long been recognized and is, from a constitutional standpoint, hardly controversial. Also, the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult. These have evolved detailed, intricate and comprehensive regulations, including price-fixing. They have been much litigated but were generally sustained by this Court as within the powers of the State over its internal commerce as against the claim that they violated the Fourteenth Amendment."

Also, see *Hegeman Farms Corporation v. Baldwin*, 293 U. S. 163, 55 S. Ct. 7, 79 L. Ed. 259; *Borden's Farm Products Co. v. Ten Eyck*, 297 U. S. 251, 56 S. Ct. 453, 80 L.

Ed. 669; *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835.

The right of a State to control the price at which milk may be sold has been sustained by the following State courts: *Franklin v. State ex rel. Alabama State Milk Control Board*, 1936, 232 Ala. 637, 169 So. 295; *Jersey Maid Milk Products Co. v. Brock*, 1939, 13 Cal. (2d) 620, 91 P. (2d) 577; *State v. Stoddard*, 1940, 126 Conn. 623, 13 A. (2d) 586; *Shiver v. Lee, Fla.* 1956, 89 So. (2d) 318; *Albert v. Milk Control Board*, 1936, 210 Ind. 283, 200 N. E. 688; *Schwegmann Brothers Giant Super Markets v. McCrory*, 1959, 237 La. 768, 112 So. (2d) 606; *Johnson v. Michigan Milk Marketing Board*, 1940, 295 Mich. 644, 295 N. W. 346; *State ex rel. North Carolina Milk Commission v. Galloway*, 1959, 249 N. C. 658, 107 S. E. (2d) 631; *In re Opinion of the Justices*, 1937, 88 N. H. 497, 190 A. 713; *State ex rel. State Board of Milk Control v. Newark Milk Co.*, 1935, 118 N. J. Eq. 504, 179 A. 116; *Savage v. Martin*, 1939, 161 Or. 660, 91 P. (2d) 273; *Rohrer v. Milk Control Board*, 1936, 322 Pa. 257, 186 A. 336; *State v. Auclair*, 1939, 110 Vt. 147, 4 A. (2d) 107; *Reynolds v. Milk Commission of Virginia*, 1935, 163 Va. 957, 179 S. E. 507; *State ex rel. Finnegan v. Lincoln Dairy Co.*, 1936, 221 Wis. 1, 265 N. W. 197, 851.

The only decision that we have found to the contrary is *Harris v. Duncan*, 1951, 208 Ga. 561, 67 S. E. (2d) 692.

In all of these cases the unique nature of the milk industry in relation to the health and general welfare of the people is emphasized. In *Savage v. Martin*, *supra*, 161 Or. 660, 91 P. (2d) 273, 281, the Court said: "Laws prescribing minimum prices for milk are justified by the courts on the ground, among others, that the industry is not only a basic one, which merely concerns the economic welfare and the health of the people, but also a unique one. The public need is for a constant daily supply of pure wholesome milk. In certain markets the demand fluctuates as does the supply. Milk is a highly perishable product which cannot be stored, but must

be sold as fluid milk within a few hours after it is produced; otherwise, it is disposed of in factory channels at lower prices."

Substantially the same view is expressed in *Shiver v. Lee*, Fla., 89 So. (2d) 318, 322, *supra*, as follows: "Milk is perishable and cannot long be stored; it is an excellent host for bacteria; it is essential to a balanced diet; babies could not subsist without it, in fact it is their primary medium of diet for the first year and it is settled that it is essential to the health of adults."

In *Rohrer v. Milk Control Board*, *supra*, 322 Pa. 257, 186 A. 336, 340, the Court said: "The milk industry is not only absolutely vital to the health and well-being of the whole people, and especially growing children, but it is also unique and in a class by itself, because (1) milk cannot be kept by the producer, but must be delivered to the dealer within twenty-four hours of production; (2) the supply must exceed the demand by a reasonable margin in order to provide for emergencies, and this excess over the normal demand be put to less profitable uses and consequently paid for at a smaller price; (3) the method of payment is based on how it is utilized by the dealer, who reports to the producer the uses made of it; (4) it must be handled with the utmost care from start to finish, and is hedged about by a host of sanitary regulations, for the protection of the public, because it is a most fertile field for the growth of bacteria. These facts make the dairy farmer or producer dependent for his return on the use to which the dealer to whom he delivers it puts it. His commodity and the price he receives for it are so far out of his control that, as a matter of fact, his supposed freedom of contract is largely illusory and at the mercy of the dealer unless the Legislature intervenes for his protection; not primarily for his benefit, but only secondarily or incidental to the main purpose of promoting the public welfare by seeing to it that an adequate supply of pure milk is available at a price reasonable to the public, the dealer, and the producer."

In view of the peculiar characteristics of the milk industry and its relation to the health and public welfare of the people, I do not think legislative price fixing manifestly and plainly constitutes a denial of either the equal protection clause or the due process clause of our Constitution. It is true that in *Rogers-Kent, Inc. v. General Electric Co.*, 231 S. C. 636, 99 S. E. (2d) 665, 669, we declined to "follow the crowd" and held our "Fair Trade Act" unconstitutional. But as there pointed out, the Act applied to every product bearing the trademark, brand or name of the producer with no distinction between commodities affected with a public interest and those that were not. I am still of the opinion that a general price fixing statute is obnoxious to the constitutional guaranty of due process of law. But here I think it may be reasonably said that the Act under consideration has a real and substantial relation to the health and welfare of the general public.

It is suggested that if this Act is upheld, the Legislature could authorize prices to be fixed on meat, flour, fish, vegetables or any other article of food. Apprehension of a somewhat similar nature has been expressed before. See the dissenting opinion of Mr. Justice Field in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. But we are not now called upon to determine what other articles of food, if any, are so "affected with a public interest" as to justify price fixing by statute. As pointed out by Mr. Justice Roberts in *Nebbia v. People of State of New York*, *supra*, 291 U. S. 502, 54 S. Ct. 505, 511, 78 L. Ed. 940, 89 A. L. R. 1469, "a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

It is interesting to note that the Supreme Court of California after sustaining a statute similar to the one now under attack, held invalid a statute authorizing a board to establish minimum price schedules for cleaning, dyeing and pressing services. *State Board of Dry Cleaners v. Thrift-D-Lux*

Cleaners, 40 Cal. (2d) 436, 254 P. (2d) 29. And although the Supreme Court of Indiana had held that the Legislature of that State could fix prices at which milk might be sold, it held invalid a statute authorizing a State Board to fix minimum prices for barber service. *State Board of Barber Examiners v. Cloud*, 220 Ind. 552, 44 N. E. (2d) 972. In both of these decisions the milk cases were distinguished.

General recognition seems to have been given by the learned County Judge to some of the views herein expressed when he said that "production and distribution of milk are reasonably related to public health and welfare." But he concluded that price controls at the retail level "are not reasonably related to or required by the interest of the producers, distributors or the public." He stated in his order: "When the store operator purchases from the distributor at the established wholesale prices, and the producer receives from the distributor the price fixed and required by the Act, it is difficult to see how the interest of either, or of the public at large thereafter can be prejudiced or threatened by the store operator selling at such prices as they should see fit."

The Legislature evidently concluded that the price at which milk was sold at retail was inseparably connected with the evil sought to be remedied. I cannot say that such a conclusion is unreasonable or arbitrary. Most of the statutes of the other States include price fixing at the retail level. But in none of the cases sustaining them is there any recognition of the distinction made by the Court below. Such a vital consideration could not have been overlooked. The writer of the majority opinion in this case evidently concluded that in so far as the public interest was concerned, there was no distinction in principle between fixing prices at retail and at wholesale, for no reference is made to it in the opinion.

The wisdom of fixing the price of milk either at the wholesale or the retail level may from an economic standpoint be debatable. But here we are only concerned with the power of the Legislature and not whether such power should be exercised.

If I am correct in my view that the Legislature may control the price of milk, there is no doubt that such authority may be delegated to an administrative agency provided the Legislature fixes adequate standards by which such agency is to be governed or lays down a well defined and intelligent principle to which such agency must conform. *South Carolina State Highway Department v. Harbin*, 226 S. C. 585, 86 S. E. (2d) 466. The question as to whether the statute under consideration establishes an adequate standard to govern the Dairy Commission in fixing prices at retail is not included in the grounds of demurrer and I intimate no opinion thereabout. Cp. *State v. Stoddard, supra*, 126 Conn. 623, 13 A. (2d) 586.

It is also suggested that the allegations of the complaint disclose no necessity for price fixing in the instant case. But I think this should be determined on the trial of the case.

I would overrule the demurrer.

STUKES, C. J., concurs.

17688

Ernestine Butler HORNE, Respondent, v. O. P. COX and B. J. COX,
Appellants
(115 S. E. (2d) 513)

Action for partition of farmland in which plaintiff contended that she and defendants, her mother's brothers, were tenants in common, wherein a defendant who had been in possession of the land asserted title by adverse possession. The Common Pleas Court of Horry County, J. Robert Martin, Jr., J., rendered judgment upon holding that plaintiff was entitled to partition and an appeal was taken. The Supreme Court, Taylor, J., held that evidence to support contentions of a defendant as to his adverse possession was insufficient for jury and court properly held that plaintiff was entitled to partition.

Affirmed.

1. **TENANCY IN COMMON.**—In case of tenancy in common, each tenant has right in common with cotenants to possession of premises held in common and possession of one is considered possession of all.
2. **TENANCY IN COMMON.**—Occupancy of common property by one of cotenants in common is entirely consistent with existence of cotenancy.
3. **TENANCY IN COMMON.**—Presumption of occupancy of cotenant in common as in recognition of cotenancy exists but ceases moment possession becomes adverse to other cotenants.
4. **TENANCY IN COMMON.**—If it appears that cotenant in common occupying premises holds not in recognition of, but in hostility to, rights of other cotenants, such possession ceases to be constructive possession by them and becomes adverse and if so maintained for the 20-year period or the period provided for by the statute of limitations, title will vest in the possessor by adverse possession.
5. **TENANCY IN COMMON.**—For possession by one tenant in common to ripen into title by adverse possession against other cotenants, it must be of such actual, open, notorious, exclusive and hostile character as to amount to ouster of other cotenants and, while a “turning out by the heels” is not necessary to establish title by tenant in common by adverse possession, and actual ouster and exclusion of other tenants from possession must be shown and acts relied upon to establish such ouster must be of an equivocal nature and so distinctly hostile to rights of other cotenants that intent of ouster is clear and unmistakable.
6. **TENANCY IN COMMON.**—In action for partition of farmland in which plaintiff contended that she and defendants, her mother’s brothers, were tenants in common, wherein a defendant who had been in possession of the land asserted title by adverse possession, contending as basis for ouster that he was in possession, had paid taxes, cut wood, rented and tilled soil, constructed buildings, and held himself out as owner and never recognized others as cotenants, evidence to support his contentions was insufficient for jury and court properly held that plaintiff was entitled to partition.

H. T. Abbott, Esq., of Conway, for Appellants, cites: As to the appellant, having ousted the other tenants in common, the Plaintiff in particular, by the nature of his possession of the property in question: 80 S. C. 110, 61 S. E. 222; 197 S. C. 483, 15 S. E. (2d) 752; 2 McCord L. 268, 13 S. C. L. 268, 13 Am. Dec. 721; 221 S. C. 117, 69 S. E. (2d) 355; 67 C. J. S. 535; 24 S. C. 359, 79 S. E. (2d) 384; 2 Hill Eq. 511; 26 S. C. 179, 1 S. E. 711; 162 S. C. 177, 160 S. E. 436; 38 S. C. 393, 17 S. E. 136; 128 S. C. 404, 122

S. E. 495; 86 S. C. 401, 68 S. E. 661. *As to the question of ouster being an issue of fact that was raised by the testimony, and which should have been submitted to the jury:* 192 S. C. 418, 7 S. E. (2d) 68; 2 McCord 260; 6 Rich. 62; 8 Rich. 42; 2 McCord 289; 211 S. C. 382, 45 S. E. (2d) 597; 224 S. C. 359, 79 S. E. (2d) 384; 86 S. C. 401, 68 S. E. 661; 128 S. C. 404, 122 S. E. 495; 221 S. C. 117, 69 S. E. (2d) 355.

Messrs. Dawes & Dawes, of Loris, for Respondent.

July 27, 1960.

TAYLOR, Justice.

This appeal arises out of an action brought in the Court of Common Pleas for Horry County for partition of certain land located therein, it being alleged that plaintiff and the defendants were tenants in common in same. Defendants, by answer, denied plaintiff had any interest in the property. Upon trial, the only issue was that of title.

Defendants made timely motions for nonsuit and directed verdict which were refused; and plaintiff, upon completion of the testimony, moved for a directed verdict, which was granted. Thereafter, defendants moved for a new trial upon grounds that the Court erred in refusing to grant defendants' motions for a nonsuit and directed verdict and refusing to allow the case to go to the jury upon the question of ouster. This motion was refused, and it is upon these questions that the defendants appeal.

C. P. Cox, the grandfather of plaintiff, and Mrs. Laura Jane Cox, the grandmother of plaintiff, owned the land in question as tenants in common from 1904 until the death of C. P. Cox, who died intestate in 1925. Mrs. Laura Jane Cox then had an undivided interest in the land with her six children as tenants in common. In October, 1933, a deed was prepared wherein Mrs. C. P. Cox (Mrs. Laura Jane Cox), Thedus Cox Tedder, B. J. Cox, Laura Butler, C. B. Cox, and Elnita Cox conveyed to O. P. Cox "all of our interest in

the estate of the late C. P. Cox, except it is hereby agreed between the grantors and the grantee that the said Mrs. C. P. Cox does retain a life estate in the above described land." Mrs. C. P. Cox (Mrs. Laura Jane Cox) did not sign the deed, however. In 1937, Mrs. C. P. Cox (Mrs. Laura Jane Cox) died intestate leaving the six children tenants in common, with defendant, O. P. Cox, having the greater interest. On the 18th day of January, 1946, Thedus Cox Tedder, El-nita Cox Libbert, and Clyde Cox executed by way of deed their interest in their mother's estate to plaintiff's mother, Mrs. Laura Cox Butler. B. J. Cox did not sign. On the 9th day of June, 1949, Mrs. Laura Cox Butler by way of deed conveyed her interest in said land to her daughter, Mrs. Ernestine Butler Horne, who on the 30th day of June, 1954, brought an action for partition of the land in question.

It is apparent that plaintiff has established paper title to an undivided interest in the land in question. After the death of C. P. Cox, a tenancy in common existed between Mrs. Laura Jane Cox and her six children until 1933 when O. P. Cox was deeded, with a life estate being reserved to Mrs. Laura Jane Cox, the interest the other five children had acquired upon the death of their father, C. P. Cox, in 1925, which was two-thirds of the one-half. Thereafter, Mrs. Laura Jane Cox and O. P. Cox were tenants in common until Mrs. Laura Jane Cox died in 1937, who at that time owned one-half of the whole, plus a life estate in two-thirds of the other half, plus the one-third inherited from C. P. Cox.

In the case of cotenancy as in instant case, each tenant
1-5 has the right in common with a cotenant to possession of the premises held in common and the possession of one is considered the possession of all. The occupancy of the common property by one of the cotenants is entirely consistent with the existence of the cotenancy and a recognition of the rights of the other cotenants to share the possession. And the occupancy will be presumed to be that of a tenant in common recognizing the cotenancy. This presumption, however, ceases from the moment such possession

becomes adverse to the other cotenants. If it appears that the occupant of the premises holds not in recognition of, but in hostility to, the rights of the other cotenants, such possession ceases to be constructive possession by them and becomes adverse and if so maintained for the twenty year period or the period provided for by the Statute of Limitations, Code 1952, § 10-124 title will vest in the possessor by adverse possession. In order for such possession, however, to ripen into title by adverse possession against the other cotenants, it must be of such actual, open, notorious, exclusive and hostile character as to amount to an ouster of the other cotenants. While, as it is sometimes expressed, a "turning out by the heels" is not necessary in establishing title by a tenant in common by adverse possession, nevertheless an actual ouster and an exclusion of the other tenants from possession must be shown and the acts relied upon to establish such ouster must be of an unequivocal nature and so distinctly hostile to the rights of the other cotenants that intention of ouster is clear and unmistakable. *Weston v. Morgan*, 162 S. C. 177, 160 S. E. 436; *Powers v. Smith*, 80 S. C. 110, 61 S. E. 222; *Sibley v. Sibley*, 88 S. C. 184, 70 S. E. 615; Ann. Cas. 1912C, 1170; *Whitaker v. Jeffcoat*, 128 S. C. 404, 122 S. E. 495; *Satcher v. Grice*, 53 S. C. 126, 31 S. E. 3; *Miller v. Cramer*, 48 S. C. 282, 26 S. E. 657; *Gray v. Givens*, 2 Hill Eq. 511, 11 S. C. Eq. 511; *McGee v. Hall*, 26 S. C. 179, 1 S. E. 711; *Wells v. Coursey et al.*, 197 S. C. 483, 15 S. E. (2d) 752; *Brevard v. Fortune et al.*, 221 S. C. 117, 69 S. E. 355; *Watson et al. v. Little*, 224 S. C. 359, 79 S. E. (2d) 384; *Terwilliger v. Marion*, 222 S. C. 185, 72 S. E. (2d) 165.

Applying the foregoing principles to instant case, we find that defendant, O. P. Cox, himself testified:

"Q. As long as you have had it since your mother died and your daddy died, have you ever recognized any claim of your brothers and sisters in your 45 acres?

"A. No, sir; haven't made any change from the first day until today. I have done my own renting and tending and doing anything I saw fit to do on the place."

Since the death of their father in 1925 and their
6 mother in 1937, the operation of the farm had been carried on without any significant or noticeable change. There is some evidence that differences had arisen as there is testimony to the effect that in "1947 or 1949" a minister attempted to reconcile the differences between the parties, but the testimony as to this is not clear and convincing as to what was done by the defendant, O. P. Cox, to put plaintiff on notice that he was claiming the place adversely to the other cotenants. He sets up as the bases for ouster that he was in possession, paid the taxes, cut wood therefrom, rented and tilled the soil, sold some timber and constructed buildings, held himself out as owner and never recognized the others as cotenants. However, it is evident that he did recognize others as cotenants because he purchased their interest in the property. He owned an undivided interest in the place and lived thereon and the things he relies upon as notice of ouster to the others he had been doing all along prior to the death of the mother, Mrs. Laura Jane Cox. In fact, as stated above, he "made no change."

Only in rare cases, which may be said to be extreme, has it been held that ouster of the other cotenants was implied from exclusive possession, collection of rents, and improvement of the property by one cotenant. In *Powers v. Smith*, *supra*, the period of possession was thirty-six years; *Wells v. Coursey*, *supra*, twenty-seven years; *Brevard v. Fortune*, *supra*, over forty years; and in *Gray v. Givens*, *supra*, sixteen years was held insufficient.

At the conclusion of the evidence, the Court ordered a directed verdict in favor of plaintiff, holding that plaintiff is entitled to have the land in question partitioned; and we are of the opinion that the Court committed no error in doing so and in refusing defendants' motions for nonsuit, directed verdict and new trial; that the Order appealed from should be affirmed; and it is so ordered. Affirmed.

STUKES, C. J., and OXNER, LEGGE and MOSS, JJ., concur.

17689

Donald RICHARDSON by Guardian ad litem, M. L. Richardson,
Respondent, v. PILOT LIFE INSURANCE COMPANY,
Appellant
(115 S. E. (2d) 500)

Action for benefits under a scholastic accident insurance policy for hospital expenses incurred in treating leg injury suffered by student who, while his right leg was in a cast from a previous accident, struck his foot on a bump in wash-room floor when crutch slipped. From a judgment of County Court, Florence County, W. T. McGowan, Jr., County Judge, insurer appealed. The Supreme Court, Taylor, J., held that fact that student's leg was in a weakened condition as result of a leg fracture suffered some ten days earlier did not disqualify student under policy provision that, to be compensable, injury must have occurred independently of all other causes, so that question of causation was properly for jury.

Affirmed.

1. TRIAL.—In passing upon a motion for directed verdict, the testimony must be viewed in the light most favorable to party in opposition, and if more than one reasonable inference can be drawn or the inferences to be drawn from the testimony are in doubt, the case should be submitted to the jury.
2. INSURANCE.—Where student sought to obtain benefits of scholastic accident insurance policy for injury to his right leg suffered when his right foot struck floor when a crutch which student was using slipped, fact that student's right leg was in a cast as result of a leg fracture suffered ten days earlier did not disqualify student under policy provision that, to be compensable, injury must have occurred independently of all other causes, so that question of causation was for jury.
3. TRIAL.—In action by student to obtain benefits of scholastic accident insurance policy for injury to his right leg suffered when his right foot struck floor when a crutch, which student was using as a result of having suffered a leg fracture some 10 days earlier, slipped, failure to charge that in order for student to recover, in view of policy's exclusion clause, accident must be the sole proximate cause of the injury, was not error in view of instruction given and in view of insurer's general denial and failure to plead exclusion clause as a

defense, where exception to such charge had only been given orally at the conclusion of charge and where no written request to charge had been submitted to court either before or after argument. Code 1952, §§ 15-1601 *et seq.*, 15-1612; Circuit Court Rules, rule 11.

Messrs. Willcox, Hardee, Houck & Palmer and W. Laurier O'Farrell, of Florence, for Appellant, cite: As to the accident, from which the injury arose, being not covered under the policy contract: 29 Am. Jur. 750, par 996. As to error on part of trial Judge in refusing defendant's request for a charge that the accident must be the sole proximate cause of injury: 49 Fed. (2d) 586. As to difference between a latent existing condition and a patent condition: 82 A. L. R. 1411; 21 Ohio App. 129, 152 N. E. 796.

Messrs. Yarborough & Nettles, of Florence, for Respondent, cite: As to applicable legal principles being the same when applied to existing conditions, both latent and patent: 231 S. C. 111, 97 S. E. (2d) 392; 57 S. D. 226, 231 N. W. 930; 303 P. (2d) 498; 303 P. (2d) 492; 160 N. C. 399, 76 S. E. 262, 42 L. R. A., N. S., 597.

July 28, 1960.

TAYLOR, Justice.

This appeal arises out of suit brought to recover benefits under a scholastic accident insurance policy covering students, teachers, administrators, and clerical employees of School District No. 1 of Florence County, the pertinent provisions of which are:

"If any person, as a result, directly and independently of all other causes, of bodily injuries caused by an accident occurring while insured hereunder and while

"(1) attending school during the hours and on the days when school is in session;

* * *

"(which injuries are herein called 'such injuries') shall suffer * * * or shall incur expenses for hospital confinement, x-ray examination, professional ambulance service, or the services of a physician, dentist or Registered Nurse com-

mencing within thirty days and occurring within twelve months following the date of the accident causing such injuries, * * *"

The complaint alleges that plaintiff, while attending Harlee School in the City of Florence, slipped and fell, causing an injury to his leg which resulted in his incurring expenses for hospitalization and an operation in the amount of \$287.23. Defendant filed a general denial, admitting only the issue of the policy and prayed reference to the policy for its exact terms.

The testimony shows that on March 5, 1958, plaintiffs' right leg was in a cast and he was using crutches at the time due to having previously fractured his leg on February 23, 1958; that on this date while attending school he went to the washroom in preparation for lunch and while there his crutch slipped causing him to lose his balance and "my foot hit a bump in the floor." Shortly thereafter, he was admitted to McLeod's Infirmary where an open reduction was done to his leg to repair the damaged tibia and fibula.

The defendant moved for a nonsuit on the ground that the testimony disclosed conclusively that at the time of the accident of March 5, plaintiff had his leg in a cast as a result of the February 23 accident and that, therefore, the second accident was not an accident directly and independent of all other causes because the condition of his leg created by the first accident was a cause of the treatment and expenses incurred by the second accident. This motion was refused. At the conclusion of the testimony, defendant moved for a directed verdict on the same ground and this motion was denied and the case submitted to the jury. By agreement, the jury was instructed to find for plaintiff or defendant without regard to the amount should they find for the plaintiff. The jury found for plaintiff and defendant moved for Judgment N. O. V. which was also refused and defendant appeals.

In passing upon the motion for Judgment N. O. V., the Trial Judge stated the issue as being: "That the evidence

conclusively proves that the plaintiff's injury of March 5, 1958, and the ensuing expenses did not result directly and independently of all other cause in that the injury of February 23, 1958, was a contributing cause."

Donald Richardson, the injured child, testified:

"Q. Now, you stated you had a cast on your leg when you went down to the washroom? A. Yes, sir.

"Q. Was the cast on your leg giving you any trouble? A. No, sir.

* * *

"Q. Donnie, when you went to Dr. Dawson the first time, did he set your leg? A. Yes, sir.

* * *

"Q. Did the doctor put a cast on you? A. Yes, sir.

"Q. After he put the cast on and after you went to see him, did you have any more trouble with it until you fell in the washroom? A. No, sir."

Dr. George R. Dawson, defendant's witness, testified:

"A. Hardly, you couldn't break a leg, or you would not break a leg if you had a normal bone and you just let a crutch slip out there, assuming you were on crutches and a normal bone and you just put your weight on the leg, presumably not.

"Q. On March 5, 1959, what was the condition of the healing process by March 5th? A. Well, that was only, as you know, sir, that was only 12 days less than that, February 23, only about ten days after the accident and nature hadn't formed much glue around this oblique fracture, and of course it was susceptible to a strain or slip with any pressure.

* * *

"Q. Now, doctor, regardless of the degree of the fall and the slipping, would he have had any trouble with his leg if he hadn't of slipped in the washroom on that occasion? A. Apparently not.

"Q. His recovery would have been uneventful? A. Probably so."

It must be noted that in instant case plaintiff does not seek to recover for disability but seeks to recover for certain expenses to which plaintiff was put in securing treatment for the March 5 injury.

In *Kilgore v. Reserve Life Insurance Company*, 231 S. C. 111, 97 S. E. (2d) 392, the policy insured "against loss * * * resulting directly and independently of all other causes from accidental bodily injury sustained * * *." In that case, plaintiff was injured when he slipped upon a wet floor. Defendant contended that plaintiff's arthritic pre-existing condition was a contributing cause; therefore, the loss was not directly and independent of all other causes. This contention was rejected, the Court stating:

"In order to recover under a policy of this kind, the law does not require that the insured be in perfect health at the time an accident occurs. *Graham v. Police & Firemen's Ins. Ass'n*, 10 Wash. (2d) 288, 116 P. (2d) 352. In *Silverstein v. Metropolitan Life Ins. Co.*, 254 N. Y. 81, 171 N. E. 914, 915, Chief Judge Cardozo said: 'A policy of insurance is not accepted with the thought that its coverage is to be restricted to an Appolo or a Hercules.'

"In *Langeberg v. Interstate Business Men's Acc. Ass'n*, 57 S. D. 226, 231 N. W. 930, insured, a carpenter, received a blow on his abdomen as a result of a fall. Immediately thereafter and for some time, he suffered from stomach hemorrhages. It was shown that he had a pre-existing gastric ulcer. In holding that it was a question for the jury as to whether loss of time resulted from the accidental injury 'independent of all other causes', the Court said:

"It is to be kept in mind that this is an action to recover, not for death, but for loss of time resulting from the accident. Even if a gastric ulcer existed, it had caused plaintiff no inconvenience up to the time of the accident; he had no reason to even suspect it existed. But for the accident he might have gone on working as before, unaware of the ulcer until death overtook him from a natural cause entirely dis-

associated from the ulcer. Had it not been for the accident he might have lived out his life and never lost any time from work. With that possibility may it not be said that the accident was the sole cause of the loss of time resulting from the injury?" "

See also, 45 C. J. S., Insurance, § 756, page 785; and *Baehr v. Union Casualty Co. et al.*, 133 Mo. App. 541, 113 S. W. 689, where we find:

"* * * If one insured is injured, and then afterwards is again injured, and then dies within the time limited by the policy, and would not have died but for the last injury, he may recover even though the last injury would not have been fatal but for the first. Otherwise one weakened by disease or injury so as to become less able to withstand a succeeding injury which is the immediate cause of the death would be unprotected. * * *"

The facts in the foregoing cases are not on all fours with those of instant case, but the logic and reasoning therein are persuasive here.

In passing upon a motion by defendant for a directed
1, 2 verdict, the testimony must be viewed in the light most favorable to plaintiff, and if more than one reasonable inference can be drawn or if the inferences to be drawn from the testimony are in doubt, the case should be submitted to the jury. *Lineberger v. City of Greenville*, 178 S. C. 47, 182 S. E. 101; *Lynch v. Pee Dee Express, Inc.*, 204 S. C. 537, 30 S. E. (2d) 449; *Spencer v. Kirby*, 234 S. C. 59, 106 S. E. (2d) 883; *Williams v. Clinton*, S. C., 114 S. E. (2d) 490. The doctor testified that in his opinion recovery from the first injury would have been uneventful. It, therefore, was a question for the jury whether the expense of hospitalization and operation would have been incurred had it not been for the slipping in the washroom on March 5.

Defendant also contends that the Court erred when
3 it failed to charge that in order for plaintiff to recover, the accident must be the sole proximate cause

of the injury for the reason that under the exclusions appearing in the policy is the following:

"No payment of any kind shall be made for injury, death or any other loss caused, wholly or partly, directly, or indirectly, by

* * *

"(3) disease or bodily or mental infirmity, or by medical or surgical diagnosis or treatment thereof * * *"

The answer of defendant as heretofore stated was a general denial and the exclusion was not pleaded as a bar to recovery. Defendant's motion for directed verdict was upon the theory that had it not been for the weakened condition of the leg caused by the accident of February 23, the accident of March 5 would not have occurred, and counsel for defendant stated that in his opinion where recovery was sought under policy requiring injury to be directly and independent of all other causes, such injury must of necessity be the sole proximate cause.

At the conclusion of the charge when counsel was asked if there was anything further, defendant stated: "We would just like to note an exception to the entire charge relating to proximate cause, * * *" The charge was to the effect that the defendant's denial placed upon plaintiff the burden of proof of establishing by the greater weight or preponderance of the evidence that plaintiff did sustain an accident during school hours and sustained injuries independent of all other causes; that they should consider whether or not plaintiff has established by the same burden of proof that the injuries sustained and resulting hospitalization and doctors' bills were caused by an accident independent of all other causes, which is the language set out in the policy.

Chapter 10 of Title 15, Code of Laws of South Carolina, 1952, establishes the Civil Court of Florence. Section 15-1612, Code of Laws of South Carolina 1952, provides: "The same forms of pleading and the same rules of practice and evidence shall obtain in the civil court as are provided by

law for the conduct and trial of civil cases in the circuit courts.”

Rule 11 of the Rules of Practice for Circuit Courts of South Carolina, Volume 7, Code of Laws of South Carolina 1952, 1959 Cumulative Supplement, Page 42, provides:

“Before the argument of the case commences the counsel on either side shall submit to the Court in writing such propositions of law as they propose to rely on, which shall constitute the request to charge: Provided, however, That nothing herein contained shall prevent either counsel at the close of the argument from submitting such additional requests as may be suggested by the course of the argument,
* * *

It is apparent that no written request to charge that before recovery could be had, the injury of March 5 must be the sole proximate cause of the subsequent hospitalization and doctors' bills was submitted to the Court prior to argument, and no oral request to so charge was made either before or after argument. Reference was made thereto during counsel's argument of motion for a directed verdict, but no request was made as set forth in Rule 11, heretofore referred to.

For the foregoing reasons, we are of opinion that all exceptions should be overruled and the judgment appealed from affirmed; and it is so ordered. Affirmed.

STUKES, C. J., and OXNER, LEGGE and MOSS, JJ.,
concur.

17690

John D. BONEY, Appellant, v. TRANS-STATE DREDGING CO.,
Respondent, J. Elmo LEWIS, Appellant, v. TRANS-STATE
DREDGING CO., Respondent
(115 S. E. (2d) 508)

Actions against Florida dredging corporation for damage and injury sustained when cable connecting defendant's

dredge, operating in Savannah River, which forms boundary between South Carolina and Georgia, shifted position, causing cable connecting dredge with South Carolina shore to rise up and overturn boat in which plaintiffs were travelling. The Common Pleas Court, Hampton County, G. Badger Baker, J., entered order sustaining defendant's motion to set aside attempted service of summons as ineffectual to bring defendant within court's jurisdiction, and dismissing complaints, and plaintiffs appealed. The Supreme Court, Legge, J., held that where defendant's operations extended over continuous period of over ten months and over an area of 142 miles of Savannah River, and such operations, which were normally incident to defendant's business, were conducted of necessity sometimes in Georgia and sometimes in South Carolina in that they required dredging on both sides of boundary and cutting of banks on both sides of river, defendant's operations constituted corporate activity within South Carolina sufficient to subject defendant to jurisdiction of South Carolina courts and render it amenable to substituted service of process.

Reversed and remanded.

1. **CORPORATIONS.**—Question whether foreign corporation is doing business within state, so as to subject it to jurisdiction of courts of state, must be resolved upon facts of particular case.
2. **CORPORATIONS.**—In determining whether foreign corporation is doing business within state so as to subject it to jurisdiction of state courts, court may take into consideration such matters as duration of corporate activities in state of forum, character of acts giving rise to suit, and circumstances of their commission, as well as the balancing of inconvenience to parties, respectively, of trial in that state on one hand and in state of corporate domicile on the other.
3. **CONSTITUTIONAL LAW.**—Exercise by foreign corporation of privilege of conducting activities within state may give rise to obligations, and, so far as those obligations arise out of or are connected with activities within state, a procedure requiring corporation to respond to suit brought to enforce such obligations does not offend due process of law clause.
4. **CORPORATIONS.**—Where operations of Florida dredging corporation extended over continuous period of over ten months and over an area of 142 miles of Savannah River, which forms boundary between

South Carolina and Georgia, and such operations, which were normally incident to corporation's business, were conducted of necessity sometimes in Georgia and sometimes in South Carolina, in that they required dredging on both sides of boundary and cutting of banks on both sides of river, corporation's operations constituted corporate activity within South Carolina sufficient to subject corporation to jurisdiction of South Carolina courts and render it amenable to substituted service of process in actions against it for damage and injury sustained when cable connecting corporation's dredge with South Carolina bank caused plaintiffs' boat to overturn. Code 1952, § 12-722.

Messrs. Murdaugh, Eltzroth & Peters, of Hampton, for Appellants, cite: As to the Respondent, at the time of the alleged accident and at the time of the personal service of the summons, having an agent and a place of business in South Carolina and was here transacting business: 257 U. S. 516, 42 S. Ct. 173; 20 C. J. S. 154, 155; 20 C. J. S. 203; 200 S. C. 393, 21 S. E. (2d) 34; 174 S. C. 24, 175 S. E. 880; 197 S. C. 129, 14 S. E. (2d) 628; 73 S. C. 526, 53 S. E. 991. As to the Defendant maintaining the necessary relations, contacts or ties with the State of South Carolina so as to make it amenable to the jurisdiction of its Courts and the substituted service of process upon the Secretary of State of South Carolina insufficient to make Defendant amenable to the jurisdiction of the Courts: 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057; 116 Vt. 569, 80A. (2d) 664, 25 A. L. R. (2d) 1193.

Messrs. W. L. Rhodes, Jr., of Hampton, Blatt & Fales, of Barnwell, and Lawton, O'Donnel & Sipple, of Savannah, Ga., for Respondent, cite: As to the defendant, a foreign corporation, not doing business in the State of South Carolina to such an extent, as to be subject to the jurisdiction, properly invoked, of a circuit court of this State: 230 S. C. 562, 96 S. E. (2d) 825; 208 S. C. 379, 38 S. E. (2d) 242; 207 S. C. 226, 36 S. E. (2d) 465; 188 S. C. 367, 199 S. E. 420; 197 S. C. 129, 14 S. E. (2d) 628; Fletcher Encyclopedia of Corporations, Vol. 18, Sec. 8709-8713; 208 S. C. 379, 38 S. E. (2d) 242; 202 S. C. 193, 66 S. E. (2d) 813; 207 S. C. 226, 36 S. E. (2d) 465; 172 S. C. 415, 174 S. E.

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385; 176 S. C. 59, 179 S. E. 693; 173 S. C. 527, 176 S. E. 711; 174 S. C. 24, 176 S. E. 880; 188 S. C. 367, 199 S. E. 420; 197 S. C. 129, 14 S. E. (2d) 628; 220 S. C. 193, 66 S. E. (2d) 813; 204 S. C. 186, 28 S. E. (2d) 815; 207 S. C. 226, 36 S. E. (2d) 465; 200 S. C. 393, 21 S. E. (2d) 34; 208 S. C. 379, 38 S. E. (2d) 242; 220 S. C. 193, 66 S. E. (2d) 813; 230 S. C. 562, 96 S. E. (2d) 825; 156 F. Sup. 372. *As to who is, and who is not, an agent of a foreign corporation:* 230 S. C. 562, 96 S. E. (2d) 825; 73 S. C. 526, 53 S. E. 991; (N. J. Sup.) 20 Atl. 760; 173 S. C. 527, 176 S. E. 711; 197 S. C. 129, 14 S. E. (2d) 628. *As to a finding by Circuit Court as to jurisdiction being conclusive unless wholly unsupported by evidence or manifestly influenced or controlled by error of law:* 123 S. C. 515, 116 S. E. 101; 124 S. C. 346, 117 S. E. 594; 172 S. C. 415, 174 S. E. 385; 174 S. C. 24, 176 S. E. 880; 175 S. C. 291, 179 S. E. 34; 181 S. C. 171, 186 S. E. 272; 188 S. C. 367, 199 S. E. 420; 197 S. C. 129, 14 S. E. (2d) 628; 207 S. C. 226, 36 S. E. (2d) 465; 208 S. C. 379, 38 S. E. (2d) 242.

August 2, 1960.

LEGGE, Justice.

In each of these two tort actions the defendant, a Florida corporation not domesticated in South Carolina, appearing specially, moved to set aside the attempted service of the summons as ineffectual to bring it within the court's jurisdiction. Such service having been made in both cases at the same time and place and in the same manner, the motions were argued together; and in a single order the circuit court sustained them and dismissed the complaints. From that order the plaintiffs have appealed.

The complaints alleged in substance that on March 28, 1959, the plaintiffs, residents of Allendale County, South Carolina, were traveling downstream on the Savannah River at a point some five miles upstream from the point where U. S. Highway 301 (which traverses Allendale County in a northeast-southwest direction) crosses it; that

at said time and place the defendant was engaged in dredging operations on the South Carolina side of the river; and that the plaintiffs, having signaled for permission to pass defendant's dredge, and having been signaled to proceed, attempted to pass between the dredge and the South Carolina bank of the river, when suddenly and without warning, as the result of its negligent operation by defendant's agents, the dredge shifted its position, causing a cable that ran from the dredge, under the surface of the river, to the South Carolina bank, to rise up and overturn the boat in which the plaintiffs were traveling, thereby causing injury and damage to them.

Commencement of these actions, *in personam*, was sought by two methods:

1. Substituted service of the summons upon the Secretary of State of South Carolina pursuant to Section 12-722 of the 1952 Code; and
2. Personal service upon an employee of the defendant corporation.

The circuit court held the attempted service ineffectual because, in its judgment:

1. At the time of the alleged accident and of the attempted service the defendant was not doing business in this State within the meaning of Section 12-722; and
2. The defendant's employee to whom copies of the summonses were delivered on or about August 29, 1959, was not an officer or agent upon whom valid service could be made under Section 10-421.

Section 12-722, reads as follows:

"Whenever any foreign corporation transacts business in this State without first having complied with the provisions of § 12-721 and pursuant thereto designating a principal place of business or place of location of such corporation in this State at which all legal process may be served, the foreign corporation so transacting business in this State without complying with said section shall be deemed to have

designated the Secretary of State as its true and lawful agent upon whom may be served all legal process in any action or proceeding against such foreign corporation growing out of the transaction of any business in this State. Nothing herein shall apply to insurance companies or associations required to pay fees to the Department of Insurance of this State."

The crucial issue here is: Was the defendant doing business in this State at the time of the accident? If that issue be resolved in the affirmative, the substituted service under Section 12-722 was good. That Section does not require that the defendant be doing business in this State at the time of such service.

The facts upon which defendant's motions were presented to the circuit judge are not in dispute. They appear in the affidavits of Patrick Henry Sturm, the captain of the dredge, B. A. Bittan, Jr., the secretary of the defendant corporation, and C. A. Boyd, leverman on the dredge, as follows:

Captain Sturm: Deponent, a resident of Lake Wales, Florida, was in charge of defendant's dredging operations on the Savannah River under its contract with the United States Corps of Army Engineers, Savannah District. These operations entailed removal of sand bars and making of land cuts over an area of 142 river miles, *i. e.*, from Mile 212, approximately 12 river miles below Augusta, Georgia, to Mile, 70, above Savannah; they commenced on October 29, 1958, and were completed on September 2, 1959. The work was "around the clock" on three eight-hour shifts. The crew, none of whom came from South Carolina, were lodged and took their meals on the Georgia side of the river. Supplies and equipment were procured from Georgia and Florida; none from South Carolina. Between October, 1958, and April, 1959, operations were based on Augusta, the defendant's headquarters and office being in a hotel there. In April, 1959, the headquarters were moved to a trailer at Sylvania, Georgia. During the entire operation defendant had no office in South Carolina. Equipment used on the Savannah River

job consisted of a dredge, an oil barge, a tug, a crewboat, and twenty-four sets of pontoons. To straighten the channel by eliminating sharp bends of the river twelve land cuts were made through its banks on both sides, seven on the Georgia side and five on the South Carolina side. On August 28, 1959, the dredge was located on the Georgia side of the river at point Mile 71 from Savannah; and it remained on that side until August 31, when it dredged out a sand bar on the South Carolina side from about 8:00 p. m. to 11:00 p. m. It then moved back to point Mile 70.5 on the Georgia side to remove some logs and clean up some spots that had caved in; and it remained on the Georgia side until this clean-up work, which was completed on September 2, finished the job. C. A. Boyd, the leverman on the dredge, to whom the summonses were delivered on or about September 1, was not a permanent employee of the defendant; he was a transient dredge worker whom deponent had employed on defendant's behalf in January, 1959, for the duration of the Savannah River job. Boyd's duty was to operate the levers during his shift; he had no authority with respect to defendant's activities except such as was given to him by deponent, his immediate supervisor. Deponent was not present when the summonses were delivered to Boyd; and he had never given Boyd authority to accept any summons or other legal paper in deponent's absence.

B. A. Bittan, Jr.: Deponent, a resident of St. Lucie County, Florida, is secretary of the defendant, a Florida corporation not domesticated in South Carolina and owning no property there. Defendant has never maintained any facilities in South Carolina, nor has it ever paid any unemployment compensation tax to that State. The only connection that defendant had with the State of South Carolina during the dredging and bank revetment job on the Savannah River was that it "did dredge the bottom of the channel of the Savannah River from Mile 212.1 to Mile 71.0, and in the event that South Carolina territorial boundary is the center of the Savannah River, to that extent Trans-State Dredging Com-

pany had occasion to do work in South Carolina." That during the performance of said work all facilities, purchasing arrangements, equipment and headquarters of the defendant were located and conducted in either Florida or Georgia.

C. A. Boyd: Operator and leverman of the dredge, and so employed for about nine months prior to October, 1959. On September 1, 1959, while the dredge was spudded on the Georgia side of the river about Mile 80 from Savannah, a man came in a boat from the South Carolina side and asked to see the captain, saying that he had some papers to serve. Deponent stated to him that he had no authority to take any papers, and that he did not know when he would see the captain; whereupon the man left the papers aboard the dredge and returned to the South Carolina side.

No universal formula has been, or is likely to be, devised for determining what constitutes "doing business" by a foreign corporation within a state in such sense as to subject it to the jurisdiction of the courts of that state. The question must be resolved upon the facts of the particular case. *Jones v. General Motors Corporation*, 197 S. C. 129, 14 S. E. (2d) 628; *State v. Ford Motor Co.*, 208 S. C. 379, 38 S. E. (2d) 242.

Recent decisions of both federal and state courts have tended to discard older concepts whereby jurisdiction was accorded on the fictional premise of the corporation's implied consent or on the theory that the corporation is "present" wherever its activities are carried on, and to substitute therefor, as the jurisdictional test, the requirement that the corporation have such contact with the state of the forum "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 S. Ct. 154, 158, 90 L. Ed. 95, 161 A. L. R. 1057; *Travelers Health Association v. Virginia*, 339 U. S. 643, 70 S. Ct. 927, 94 L. Ed. 1154; *Perkins v. Benguet Consol. Mining Co.*, 342 U. S. 437, 72 S. Ct. 413, 96 L. Ed. 485; *McGee v. Inter-*

national Life Ins. Co., 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. (2d) 223; *State v. Ford Motor Co.*, *supra*; *Ross v. American Income Life Ins. Co.*, 232 S. C. 433, 102 S. E. (2d) 743; *Erlanger Mills v. Cohoes Fibre Mills*, 4 Cir., 239 F. (2d) 502; *Kilpatrick v. Texas & P. Ry. Co.*, 2 Cir., 166 F. (2d) 788; *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A. (2d) 664, 25 A. L. R. (2d) 1193.

That this principle is in itself nebulous is evident
 2 from its statement. But in its application we are directed by the authorities just cited to certain considerations that are of help in the solution of the problem in most cases, and seem important here. Among them are the duration of the corporate activity in the state of the forum; the character of the acts giving rise to the suit, and the circumstances of their commission; and the balancing of the inconvenience to the parties, respectively, of a trial in that state on the one hand and in the state of the corporate domicile on the other.

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less.
 * * * Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties or relations * * *.

"But to the extent that a corporation exercises the
 3 privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obli-

gations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." *International Shoe Co. v. State of Washington*, *supra*.

Whether, as was held in *Smyth v. Twin State Im-*

4 *provement Corp.*, *supra*, jurisdiction may be justified from the commission of a single tortious act within the state although the corporation may not have been "doing business" in the generally accepted constitutional sense of that phrase, is a question that we need not decide here. In the case at bar the defendant's operations extended over a continuous period of more than ten months and over an area of one hundred forty-two miles of the Savannah River, the middle of which (except where there are islands, and in that case a line midway between the island bank and the South Carolina shore) is the boundary between South Carolina and Georgia. *State of Georgia v. State of South Carolina*, 257 U. S. 516, 42 S. Ct. 173, 66 L. Ed. 347; 259 U. S. 572, 66 L. Ed. 1069. Those operations were such as were normally incident to the defendant's business; they were conducted, of necessity, sometimes in Georgia and sometimes in South Carolina; they required dredging on both sides of the boundary; they required cutting of banks on both sides of the river to make a new channel. In the present state of the record it appears uncontroverted that the accident from which this action resulted occurred in the course of those operations and when defendant's dredge was moored to the South Carolina bank by a cable, the sudden lifting of which overturned the plaintiffs' boat. We are of opinion that the defendant's said operations, although not continuously performed in South Carolina, constituted corporate activity within that state sufficient to meet the test before referred to and therefore to render the defendant subject to the jurisdiction of its courts. Having so concluded, we hold that the substituted service of the summons under Section

12-722 was proper and sufficient; and it therefore becomes unnecessary to pass upon the validity of the attempted personal service.

It is not clear from the record before us whether or not the complaints have been served. The defendant may plead to them within twenty days after their service or within a like period after notice of the filing of the remittitur herein, as the case may be.

Reversed and remanded.

STUKES, C. J., and TAYLOR, OXNER and MOSS, JJ., concur.

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Edwina BENNETT, Smith Bradshaw, Mary Lee Patterson, Sam Mouzon, Estelle Mack, Horton Mack, Sue Mack, Tarbell Mack, Bertha Middleton, Ethel Boyd, Charles Bennett, Mary Bennett, Frank Bennett, George Bennett, Louise Bennett and Susie Bennett, Appellants, v. G. T. FLOYD and Henry Roe, representing the unknown heirs, next of kin, administrators, executors and assigns of E. B. Rhodus, Respondents.

(115 S. E. (2d) 659)

Action by heirs of former owner of 269-acre tract of land questioning validity of partition action and judicial sale by which heirs had been divested of their interest. On exceptions to the report of a referee, the Court of Common Pleas, Clarendon County, James Hugh McFaddin, J., confirmed report of referee and heirs appealed. The Supreme Court, Oxner, J., held that where no evidence was adduced as to the actual value of property when it was sold to purchaser for \$100.00, evidence was insufficient to establish fraud or collusion overthrowing the sale, or to overcome the presumption of validity of such judicial sale.

Affirmed.

1. JUDICIAL SALES.—A purchaser in good faith at a judicial sale is bound only to see that the court rendering judgment under which sale was effected had jurisdiction of the subject of the action and

of the parties in interest, and he is not affected by irregularities or errors in the record for which the judgment might have been vacated in a direct attack, or reversed on appeal, or by secret vices affecting the judgment, which are not disclosed by examination of the record.

2. JUDICIAL SALES.—Where record of a judicial sale and affidavit of service in connection with such sale show that necessary parties to sale have been served, the burden is on one questioning validity of sale to establish by clear and convincing evidence that affidavit of service is false.
3. PARTITION.—Evidence in action in which validity of a prior partition sale was questioned on the grounds that certain parties had not been properly served in the prior action, did not meet the required quantum of proof to overcome the effect of the record in the prior action containing an affidavit of service showing the parties to have been served and showing that a guardian *ad litem* had been appointed for such parties.
4. TRIAL.—Where judgment roll in prior action was offered in evidence without qualification or restriction, contents of judgment roll were treated as admitted generally, as applicable to any issue contents tended to prove, and the contents thereof were available to either party in instant action.
5. PARTITION.—Where record in prior partition action contained testimony that one of heirs of former owner of property involved was dead at the time of action, and where judgment roll in that action was offered into evidence in instant action in which validity of the judicial sale following partition was being challenged on the grounds that heir was not dead at the time of prior partition action and had not been served, testimony in former action could properly be considered, and was sufficient to support finding that heir was already dead when parties to prior partition action had been served.
6. PARTITION.—A court of equity, where practicable, and where no prejudice will result to the owners, may decree a partial partition in kind by allotting to one of owners one of several tracts, or a part of a single tract, in satisfaction of his share and order a partition by sale of the remainder of single tract or of other tracts, with the division of the sale proceeds among the other owners in satisfaction of their respective shares.
7. PARTITION.—In action for partition of a 269-acre tract of land, it was within court of equity's inherent power to set aside 10 acres for certain of heirs of former owner and to direct that remainder of tract be sold at public auction for distribution to remaining heirs.
8. PARTITION.—Even if fraudulent collusion were present between parties in partition action resulting in a grossly inadequate price being paid at judicial sale following such action, such fraud could

not affect a *bona fide* purchaser at sale where conspiracy could not be discovered by an examination of the record and where price paid was not so grossly inadequate as to shock the conscience of the court.

9. JUDICIAL SALES.—The inadequacy of price paid at a judicial sale, unless so gross as to shock the conscience of the court or accompanied by circumstances from which fraud may be clearly inferred, will not justify the overthrow of sale.
10. PARTITION.—In action by heirs of former owner of 269-acre tract of land, attacking validity of a prior partition action and judicial sale, where no evidence was adduced as to the actual value of the property when it was sold to purchaser for \$100.00, evidence was insufficient to establish fraud or collusion overthrowing the sale or to overcome presumption of the validity of such sale.

Elliott D. Turnage, Esq., of Darlington, for Appellants, cites: As to when the uncontradicted evidence, and the facts manifested by Judgment Roll 6939 are considered, the Court, in this action, should disregard, set aside, and hold for naught the Decree and Order of Sale in same, because of lack of jurisdiction, and fraud in obtaining same: 226 S. C. 366, 85 S. E. (2d) 279; 211 S. C. 223, 44 S. E. (2d) 442; 14 S. C. (Rice Eq.) 198; 18 S. C. 94; 93 N. C. 151; 47 C. J. 451, 128 C. J. S. 199; 17 S. C. 435; 40 S. C. 69, 18 S. E. 220; 23 S. C. 154; 25 S. C. 276; 88 S. C. 1, 70 S. E. 420; 217 S. C. 147, 60 S. E. (2d) 73; 185 S. C. 27, 192 S. E. 671; 199 S. C. 218, 19 S. E. (2d) 114; 24 S. C. 398; 106 S. C. 486, 91 S. E. 796; 116 S. C. 7, 106 S. E. 843; 178 S. C. 94, 182 S. E. 306; 199 S. C. 384; 1 S. E. (2d) 797; 108 S. E. (2d) 414. As to the defendants not being bona fide purchasers: 214 S. C. 212, 51 S. E. (2d) 753; 224 S. C. 452, 79 S. E. (2d) 871; 225 S. C. 303, 82 S. E. (2d) 183; 126 S. C. 180, 119 S. E. 186; 220 S. C. 10, 66 S. E. (2d) 327. As to the Statutes of Limitations being no bar to the plaintiffs' recovery in this action: 2 Rich. 627; 162 S. C. 177, 160 S. E. 437; 229 S. C. 29, 91 S. E. (2d) 88; 17 S. C. 35; 40 S. C. 435, 19 S. E. 79; 37 S. C. 369, 16 S. E. 42; 130 S. E. 477; 202 S. C. 129, 24 S. E. (2d) 164; 6 Rich. Eq. 96; 13 S. C. 37. As to Plaintiffs' rights not being barred by laches: 186 S. C. 155,

195 S. E. 239; 205 S. C. 377, 32 S. E. (2d) 147; 201 S. C. 447, 23 S. E. (2d) 362.

Messrs. Rogers & Riggs and John G. Dinkins, of Manning, for Respondent, cite: As to the Decree in Judgment Roll No. 6939 of Clarendon County being valid and Defendant a bona fide purchaser of the property involved: 234 S. C. 330, 108 S. E. (2d) 414; 76 S. C. 484; 89 S. C. 508; 31 S. C. 91. As to the Statutes of Limitations being a bar to relief in the present Action: 1 Am. Jur. 868, Adv. Poss., Sec. 132; 11 S. C. L. (2 Nott. & McC.) 343, 10 Am. Dec. 609; 82 S. C. 358, 64 S. E. 165; 59 S. C. 342, 37 S. E. 537; 112 S. C. 131, 99 S. E. 546; 95 S. C. 567, 77 S. E. 708.

August 3, 1960.

OXNER, Justice.

Appellants brought this action to recover a 269-acre tract of land in Clarendon County. It was formerly owned by James A. Bennett who died intestate about 1904. Appellants claim that as his sole heirs at law, title is now vested in them and they are entitled to possession. G. T. Floyd, now deceased who was the only material defendant, claimed that the property was partitioned in 1928 between the heirs of James A. Bennett and sold at public auction to the Logan-Robinson Fertilizer Company from which he purchased it in 1942 and immediately went into possession. In reply, appellants assailed the validity of the partition proceedings upon numerous grounds. A more detailed statement of the issues made by the pleadings will be made after tracing the chain of title since Bennett's death.

James A. Bennett was survived by a widow and nine children. His widow never remarried and died intestate. After his death several members of the family continued to reside on and farm this tract of land. In 1921 Washington Bennett, one of the sons, mortgaged his interest to E. B. Rhodus to secure an indebtedness of \$384.10. Taxes for the year 1923, amounting to \$77.00, assessed in the name of the estate of

James Bennett, became delinquent. To satisfy these taxes the property was sold by the Sheriff of Clarendon County at public auction in February, 1925 and bid in for \$97.70 by E. B. Rhodus. He received a tax deed from the Sheriff on March 3, 1926. Apparently Rhodus never sought to obtain possession under this conveyance. In 1927, Mallard Lumber Company, which had purchased the interest of several of the heirs, brought an action to partition the property. By that time some of the children of James Bennett had died, leaving in some instances minor children. Several of the heirs had left the State and their whereabouts were unknown. After his father's death, the interest of Washington Bennett was increased by inheritance from some of the heirs and by purchase from others, so that at the time the partition action was brought, he owned almost a half interest in the property. The interest of each of the other heirs was very small. Plaintiff in that action, Mallard Lumber Company, owned a 4/52 interest only. The non-resident heirs were served by publication and guardians *ad litem* duly appointed for the minors. Most of the adult defendants defaulted. At the hearing, E. B. Rhodus, who was a party to the partition proceedings, testified that nothing had been paid on the mortgage given him by Washington Bennett and further stated that he would make no claim of title under the tax deed if reimbursed for all taxes which he had paid. By agreement of all parties who had appeared, ten acres of the 269-acre tract were set aside by the Court to certain of the heirs as their share and the remainder ordered sold at public auction. At a sale held in November, 1928, the 269-acre tract, less the ten acres above mentioned, was bid in by Logan-Robinson Fertilizer Company for \$100.00 and the usual deed executed on November 20, 1928. Apparently Washington Bennett and his family remained on this farm although the record does not disclose under what arrangement. On December 4, 1942, Logan-Robinson Fertilizer Company, for a stated consideration of \$2,500.00, conveyed this land to G. T. Floyd. After this conveyance Washington Bennett continued to reside on the prop-

erty but as a tenant of Floyd. Washington Bennett died in 1954. Thereafter his son, George Bennett, continued to rent the tract of land from Floyd. During the last few years there were also other tenants. Although George Bennett denied renting from Floyd, stating that he thought he was making payments on a mortgage, the overwhelming weight of the evidence is that Floyd took exclusive control of the property under a claim of ownership and was so recognized by Washington Bennett and later by his son George.

The instant suit by appellants was brought in January, 1959. Named as defendants were G. T. Floyd and the estate of E. B. Rhodus. However, it was conceded that the latter had no interest in the property, so that the action was in effect against G. T. Floyd alone. While this action was pending Floyd died and the executrix and devisees under his will were substituted as parties defendant.

In appellants' complaint the partition action was completely ignored and they sought only to set aside the tax deed to Rhodus. They asserted that Washington Bennett was an uneducated Negro who had been promised financial assistance by Rhodus and that a fiduciary relationship existed between them. They further alleged that Rhodus, in violation of his agreement to pay the taxes, permitted the property to be sold for delinquent taxes and bid it in himself. The tax sale was further attacked upon the ground that the property was improperly assessed in the name of the "Estate of James Bennett". In his answer, Floyd set up the partition proceedings and claimed that he was the *bona fide* purchaser from the Logan-Robinson Fertilizer Company. In addition he claimed title both by adverse possession and by prescription. A reply was filed by appellants in which they attacked the validity of the partition proceedings upon the grounds (1) that certain heirs were never served with the summons and complaint, (2) that one of the heirs, James Bradshaw, although living and a person *non compos mentis* at the time the action in partition was brought, was not made a party defendant, (3) that the Court was without jurisdiction to

partition in kind a part of the property and sell the remainder, and (4) that the Mallard Lumber Company, Rhodus and Logan-Robinson Fertilizer Company conspired to divest the heirs of their title to the property and through fraudulent collusion permitted it to be sold for an inadequate and unconscionable price. Appellants further denied in their reply that Floyd was ever in possession of the property or held adversely.

The instant case was referred to a referee who after hearing the testimony found that all those having an interest in the property were made parties to the partition proceedings and duly served with process; that there was no proof of fraud; that the proceedings in partition were regular in every respect and binding on all the parties; and that Floyd through the conveyance from Logan-Robinson Fertilizer Company acquired good fee-simple title. He further found that Floyd and his predecessor in title had been in actual, open and notorious possession under a claim of ownership continuously for a period of thirty years from which a grant would be presumed, and that Floyd himself had been in actual, open and notorious possession under a claim of ownership for more than ten years, thereby establishing title by adverse possession. On exceptions by appellants, the case was heard by the circuit Judge who confirmed the report of the referee in all respects.

We are not concerned on this appeal with the validity
1 of the tax deed to Rhodus for no one is asserting
any title under it. It is respondents' claim that G. T. Floyd was a purchaser in good faith from Logan-Robinson Fertilizer Company, which they say acquired title under a judgment rendered by a court that had jurisdiction of the subject matter and of all parties having an interest in the land sought to be partitioned. At the outset we are met with the rule that "the purchaser in good faith at a judicial sale is bound only to see that the court had jurisdiction of the subject of the action and of the parties in interest. He is not affected by irregularities or errors in the record for which

the judgment might have been vacated in a direct attack, or reversed on appeal, or by secret vices affecting the judgment, which are not disclosed by examination of the record." *Gladden v. Chapman*, 106 S. C. 486, 91 S. E. 796, 797. The Court there further stated: "Sound public policy requires that the solemn judgments of the courts and rights acquired thereunder be sustained against collateral assault, if in reason and justice it can be done."

We will first discuss the contention of appellants that 2, 3 all of the heirs were not served with process. Although in appellants' reply it is claimed that five were not served, in their brief they refer to only three, namely, Washington Bennett, Rhetus July and Janie Lee July. The affidavit of service contained in the record includes all of these parties. This affidavit also shows service on the person with whom Rhetus July and Janie Lee July, both minors, resided and the judgment roll discloses that a guardian *ad litem* was appointed for them. Under these circumstances, the burden was on appellants to establish by clear and convincing evidence that this affidavit of service was false. In *Singleton v. Mullins Lumber Co.*, 234 S. C. 330, 108 S. E. (2d) 414, 420, it was stated: "Due proof of service appears in the record of the foreclosure proceeding. Such a record, standing as it has for approximately half a century, may not be overthrown by less than the clearest and most convincing evidence. To hold otherwise would be a dangerous thing, imperiling titles to real estate and other rights long since adjudicated; it would, moreover, be contrary to precedent unbroken in the history of our jurisprudence. Even though proof of service were wholly lacking, it would be presumed that the court that rendered the judgment would not have done so without proper proof of service of the summons in the cause."

Appellants' testimony as to lack of service falls far short of meeting the required quantum of proof. It is largely negative in character and wholly unsatisfactory. The referee and circuit Judge were fully warranted in rejecting it. The exceptions relating to this question are overruled.

It is next contended that James Bradshaw, one of 4, 5 the heirs, was living at the time the partition action was instituted and was not made a party thereto. In support of this contention, appellants offered two witnesses. One testified that James Bradshaw died in 1928. He was unable to fix the exact date but stated it was some time after March 28th. He admitted, however, that he was then only four years of age. The other testified that James Bradshaw died in June, 1928. Both of these witnesses were testifying from memory. No documentary proof was offered by appellants. This testimony is contradicted by that given in the partition proceeding which was to the effect that James Bradshaw died prior to the commencement of the action. The testimony in that proceeding can properly be considered in determining the factual issue now raised. The judgment roll in the partition suit was offered in evidence by appellants without qualification or restriction. Under these circumstances, it must be treated as admitted generally, as applicable to any issue it tended to prove, and the contents thereof available to either party to this action. *Greenville County v. Stover*, 198 S. C. 240, 17 S. E. (2d) 535; *Arnold v. Life Insurance Co. of Georgia*, 226 S. C. 60, 83 S. E. (2d) 553. The last mentioned evidence is fully sufficient to support the concurrent finding of fact by the referee and circuit Judge that James Bradshaw died prior to the commencement of that action. Apart from this, however, the contention now made by appellants is inconsistent with the stipulation between the parties in the instant case "that the heirs shown in the case of *Mallard Lumber Company v. James Bennett et al.* are all the heirs of James Bennett deceased."

The validity of the partition decree is assailed upon 6, 7 the ground that the Court was without power to allot to one tenant in common his share in kind and order a sale of the remainder. We find nothing in our statutes relating to partition denying such power. The Court's inherent equitable power therefore remains unimpaired. While we have found no case in this State passing precisely

upon the question now under consideration, the general authority elsewhere is that a court of equity under proper circumstances may allot a part of the land to one co-tenant and order the remainder sold for division among the other co-tenants. In *Swogger v. Taylor*, 243 Minn. 458, 68 N. W. (2d) 376, 379, a wealth of authority is given in support of the statement that "the court in the exercise of its inherent equitable power may decree, where practicable and where no prejudice will result to the owners, a partial partition in kind by allotting to one of the owners one of several tracts, or a part of a single tract, in satisfaction of his share, and order a partition by sale of the remainder of the single tract, or of the other tracts, with a division of the sale proceeds among the other owners in satisfaction of their respective shares." Also, see *Hall v. Hall*, 250 Ala. 702, 35 So. (2d) 681.

The remaining ground upon which the judgment is 8-10 attacked is that the property was sold at a grossly inadequate price as a result of fraudulent collusion between the Mallard Lumber Company and Rhodus. If there existed such conspiracy, it was a vice which could not have been discovered by an examination of the record and, therefore, could not affect a *bona fide* purchaser. Moreover, there is no evidence to sustain the allegation of fraud. It may not be inferred from the fact alone that the property brought only \$100.00 when sold. Inadequacy of price, unless so gross as to shock the conscience of the court or accompanied by circumstances from which fraud may be clearly inferred, will not justify the overthrow of a judicial sale. *Singleton v. Mullins Lumber Co.*, *supra*, 234 S. C. 330, 108 S. E. (2d) 414; *Hamilton v. Patterson*, S. C., 115 S. E. (2d) 68. There is no testimony showing the actual value of this property when it was sold in 1928. It brought substantially the same price as when sold for taxes in 1925. No legal duty rested upon either the Mallard Lumber Co. or Rhodus to see to it that there was a bid for the full value of the property. If it was sold at an inadequate price, it was probably

due to the lack of interest on the part of the heirs of James Bennett. This is understandable. The only heir having a substantial interest was Washington Bennett. His share was heavily mortgaged and there were taxes to be paid. The fractional interest of the other heirs was exceedingly small. If a wrong was done them, they are not altogether without fault. As stated by the Court in *Gladden v. Chapman, supra*, 106 S. C. 486, 91 S. E. 796, 798, "they have no just ground to complain because the court declines to correct the wrong done them by doing a greater wrong to the defendants, and, in so doing, set a mischievous precedent."

Having concluded that appellants failed to overcome the presumption that the partition proceedings were valid, it is not necessary to determine whether Floyd established title by adverse possession. However, we have no hesitancy in saying that the overwhelming weight of the testimony is to that effect. Continuously for a period of approximately 17 years he leased the property, collected the rents and paid the taxes. He cut timber from the premises, cleared a substantial area of wood and stump land, repaired some of the houses and constructed new buildings, including houses for tenants and barns for the livestock and farm produce, and made various other improvements. His hostile possession was so open, visible and notorious that appellants knew, or in the exercise of ordinary diligence should have known, of the adverse character of his claim. *Graniteville Company v. Williams*, 209 S. C. 112, 39 S. E. (2d) 202. It is conceded that all who were minors became of age more than ten years prior to the commencement of this action.

Affirmed.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

17692

SOUTHERN RAILWAY COMPANY, Petitioner-Respondent, v.
SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, C.
R. McMillan, as Chief Highway Commissioner, and S. R. Pearman,
as State Highway Engineer, Respondents-Appellants.

(115 S. E. (2d) 685)

Action by railroad in nature of appeal from decision of State Highway Department determining that railway should contribute to cost of reconstruction of highway bridge. The Supreme Court adopted opinion of E. W. Mullins, Special Referee, to effect that reconstruction of highway bridge built to span cut in which there was a railroad track was not a grade separation structure within statute providing scheme for apportionment of costs between Highway Department and railroad for reconstructing, changing or altering a grade separation structure and railroad which owned tracks in cut was not liable for any portion of cost of reconstruction of bridge.

Judgment for railway.

1. **HIGHWAYS.**—Highway Department is a statutory creature of State deriving its powers from legislature; it has no inherent power and whatever power it attempts to exercise must be found in some statute. Code 1952, § 33-21.
2. **RAILROADS.**—Reconstruction of highway bridge built to span cut in which there was a railroad track was not a "grade separation structure" within statute providing scheme for apportionment of costs between Highway Department and railroad for reconstructing, changing of altering a grade separation structure and railroad which owned tracks in cut was not liable for any portion of cost of reconstruction of bridge. Code 1952, §§ 58-831 *et seq.*, 58-833, 58-835.

See publication Words and Phrases, for other judicial constructions and definitions of "Grade Separation Structure".

3. **STATUTES.**—Statutes in derogation of common law must be strictly construed.
4. **STATUTES.**—In considering meaning of one statute, it was proper to consider other statutory provisions relating to same subject matter.

5. **CONSTITUTIONAL LAW.**—Constitutional questions will not be determined, unless their determination is essential to a disposition of the case.

Messrs. Daniel R. McLeod, Attorney General, and Fulmer & Barnes, of Columbia, for Appellants, cite: As to power of State to require railroad to bridge its tracks: 44 Am. Jur. 527-28. As to rule that an administrative interpretation given a statute by those charged with the duty of executing it being always entitled to the most reasonable consideration and ought not to be overruled without cogent reasons: 183 S. C. 38, 190 S. E. 249; 192 S. C. 339, 6 S. E. (2d) 761; (S. C.) 111 S. E. (2d) 562; 351 U. S. 91; 356 U. S. 412. As to allocation of costs of grade separation structure: 346 U. S. 346; 100 S. W. (2d) 532. As to constitutionality of Act here in question: 216 S. C. 33, 56 S. E. (2d) 591; 44 Am. Jur. 297; 22 R. C. L. 786-787; 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979; 346 U. S. 346; 303 U. S. 177; 286 U. S. 374, 76 L. Ed. 1167, 52 S. Ct. 581; 287 U. S. 251, 77 L. Ed. 288, 53 S. Ct. 181, 87 A. L. R. 721; 107 U. S. 691, 27 L. Ed. 584; 2 S. Ct. 732.

Messrs. Frank G. Tompkins, Jr., and Robert J. Thomas, of Columbia, for Respondent, cite: As to the bridge in question not being a "Grade Separation Structure" within the meaning of Article 11, Chapter 10, Title 58, Code of Laws of South Carolina, 1952: 189 S. C. 463, 1 S. E. (2d) 624; 223 S. C. 298, 75 S. E. (2d) 605; 202 S. C. 207, 24 S. E. (2d) 353; 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, affirmed 214 U. S. 497, 29 S. Ct. 698, 53 L. Ed. 1060; 69 Colo. 266, 193 P. 668; 45 Ill. App. 572; 227 Ala. 428, 150 So. 328; 185 Ind. 277, 113 N. E. 369; 153 Ky. 718, 156 S. W. 379; 80 N. J. Eq. 412, 84 A. 1047. As to the application of Article 11, Chapter 10, Title 58, Code of Laws of South Carolina, 1952, to the cost of the bridge here involved against Southern Railway Company being an unconstitutional deprivation of property without due process of law proscribed by the State

and Federal Constitutions: 346 U. S. 346, 75 S. Ct. 92, 98 L. Ed. 51; 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949; 55 A. L. R. 660, 62 A. L. R. 815, 109 A. L. R. 768; 294 U. S. 613, 55 S. Ct. 563, 79 L. Ed. 1090; 248 N. C. 637, 105 S. E. (2d) 37; 294 U. S. 613, 55 S. Ct. 563, 79 L. Ed. 1090.

August 3, 1960.

Per curiam.

This action was commenced by Southern Railway Company, the petitioner herein, in the original jurisdiction of this Court, pursuant to Section 58-835 of the 1952 Code of Laws of South Carolina. The action is in the nature of an appeal from a decision of the South Carolina State Highway Department, appellant herein, determining that the petitioner should contribute to the cost of the reconstruction of a highway bridge near the corporate limits of the Town of York, South Carolina. The State Highway Department purported to act pursuant to Sections 58-831 *et seq.*, of the 1952 Code of Laws, in assessing forty per cent of the cost of reconstructing such bridge, which spanned a cut in which lay the tracks of the Railway Company.

This cause was referred to Honorable Edward W. Mullins, as Special Referee, for the purpose of taking the testimony and reporting to this Court his findings of fact and conclusions of law.

It appears from the record that the Special Referee convened a hearing for the purpose of taking the testimony. At such hearing, the parties submitted a stipulation of the facts. The Special Referee, in a report dated February 27, 1960, recommended that the relief sought by the Southern Railway Company be granted. The State Highway Department filed timely exceptions to such report, and sustaining grounds were also submitted by the Southern Railway Company.

The case came on to be heard before this Court upon the issues made by the exceptions filed by the South Carolina State Highway Department.

The report of the Special Referee has been carefully considered in the light of the record and the exceptions. We have concluded that the issues presented by the exceptions were correctly decided by the said Special Referee. The exceptions are overruled and the report of the Special Referee is adopted as the judgment of this Court. Let it be reported.

The report of Special Referee Mullins follows:

This action was commenced by Southern Railway Company in the Supreme Court in its original jurisdiction pursuant to Section 58-835, Code of Laws of South Carolina, 1952, and is in nature an appeal from a decision of the State Highway Department determining that Southern Railway Company should contribute to the cost of reconstructing a highway bridge in York County. The matter was referred to me by an Order of the Chief Justice dated June 12, 1957, for the purpose of taking the testimony and reporting to the Court my findings of fact and conclusions of law. It subsequently developed that the parties were able to stipulate the facts, and they are not now in dispute.

To understand the issues in the case, it is necessary to review briefly the history and nature of the bridge in question. In 1927 and 1928, the Highway Department relocated U. S. Highway No. 321 to straighten an undesirable curve and eliminate the necessity of crossing at grade a track of the Carolina and Northwestern Railway Company at two points. The relocated highway crossed a cut in which lay a track of the Southern Railway Company, and the original bridge (the predecessor of the bridge in question) was built to span that cut.

On August 5, 1955, the Highway Department served notice on Southern Railway Company that it had determined that it had become necessary to reconstruct the said bridge. The notice was stated to be given pursuant to Sections 58-831 *et seq.*, Code of Laws of South Carolina, 1952. It further recited:

"The necessity for the reconstruction of the existing structure arises by reason of the fact that the said existing struc-

ture is inadequate for traffic on Highway No. 321. The existing structure, built in 1928, is constructed of creosoted timbers and structural steel and has a twenty-two foot roadway. Timbers of the said bridge have deteriorated, and present traffic needs require a minimum roadway of thirty feet. Existing structure was designed to carry a load of H 10, and deterioration has lowered this capacity to H8, and present needs require a structure with a capacity of H20-S16. Vehicular traffic over said bridge has increased since its construction. A twenty-four hour count by this Department in 1954 showed passage of 1,664 vehicles and in 1941, a passage of 850 vehicles."

On August 19, 1955, Southern Railway Company by letter acknowledged receipt of said notice, but said:

"Southern Railway Company does not feel obligated to participate in this project as it did not contribute to the original construction or maintenance of the bridge and has derived no benefits therefrom, nor would Southern Railway Company derive any benefits from the rebuilding of this bridge."

On August 23, 1955, the Highway Department served its second notice on Southern Railway Company, reciting:

"Please Take Notice that the South Carolina State Highway Department has determined the cost of effecting the reconstruction of a grade separation structure hereinafter more particularly described, in the amount of Forty-six Thousand (\$46,000.00) Dollars, and that, pursuant to the provisions of Section 58-833, 1952 Code of Laws of South Carolina, the portion of such cost to be borne by The Southern Railway Company is the sum of 40% thereof, to wit Eighteen Thousand, Four Hundred (\$18,400.00) Dollars."

It is from the latter notice that Southern Railway Company perfected this appeal.

It is stipulated by the parties:

"1. That the track of the Southern Railway Company at the point of the York bridge and for a distance of at

least 1,000 feet on each side of the bridge, has been, since 1916, when the railroad was originally constructed, in a cut of a depth of approximately 20 feet and of a width necessary to accommodate the railroad track.

"2. That, at the point in question, the track of the Southern Railway Company never crossed any higher at grade and that, because of the physical characteristics of the situs in question, a grade crossing would not be feasible or practical.

"* * * The relocation of the highway in 1927-1928 did not eliminate any Southern Railway Company grade crossings in the immediate vicinity."

I have not recited all of the facts that were stipulated but only those that are material to the issues involved.

To place the issues in proper perspective, reference
1 should be made to the fundamental principle that the Highway Department is a statutory creature of the State (Section 3321, Code of Laws of South Carolina, 1952) deriving its powers from the Legislature. It has no inherent power. Whatever power it attempts to exercise must be found in some Act. *Martin v. Saye*, 147 S. C. 433, 145 S. E. 186. This principle seems to have been properly recognized by the Highway Department throughout these proceedings as it has repeatedly made reference to Sections 58-831 *et seq.*, Code of Laws of South Carolina, 1952, as the source of its asserted authority.

The statutory source of power on which the Highway
2 Department relies is Article 11 of Chapter 10, Title 58, Code of Laws of South Carolina, 1952, entitled "Alteration of Grade Separation Structures." Section 58-833 provides a scheme for the apportionment of costs between the Highway Department and the affected railroad of reconstructing, changing or altering a "grade separation structure and its approaches." Section 58-834 reads:

"This article shall apply to all cases where grade separation structures on State highways across railroads are, in

the judgment of the State Highway Department, for any reason inadequate for the traffic on the highway, but shall not apply to grade crossings. This article shall not be construed as relieving any railroad company from any obligation or duty now borne by or resting upon such company in connection with any grade separation structure."

Is the bridge in question a "grade separation structure"? The question has been argued fully by both sides, orally and by brief. After careful study and reflection, I am persuaded that this bridge is not such a structure. The term "grade separation" was presumably used advisedly by the Legislature to describe a structure having a particular function; that is, to separate the level of a road from the level of a railroad track at a point where such road and track cross. This was not the function of the bridge in question. There are many reasons why a bridge may be built, and one such purpose might be in some instances the elimination or prevention of a highway-railroad grade crossing. This was not the purpose here. The York bridge was built to span a cut and was no different from a bridge built to span any type of depressed area. True, there was a railroad track in the cut, but it was the latter and not the former that created a need for the bridge.

The foregoing conclusion is strengthened when consideration is had of the principle that these statutes, being in derogation of the common law must be strictly construed. *Powell v. Greenwood County*, 189 S. C. 463, 1 S. E. (2d) 624; *Purdy v. Moise*, 223 S. C. 298, 75 S. E. (2d) 605.

It is, of course, proper in considering the meaning of Article 11 to consider also other statutory provisions relating to the same subject-matter. *Dantzler v. Callison*, 230 S. C. 75, 94 S. E. (2d) 177, appeal dismissed 352 U. S. 939, 77 S. Ct. 263, 1 L. Ed. (2d) 235; *Abell v. Bell*, 229 S. C. 1, 91 S. E. (2d) 538; *Edwards v. State Educational Finance Commission*, 222 S. C. 433, 73

S. E. (2d) 456; *Arkwright Mills v. Murph*, 219 S. C. 438, 65 S. E. (2d) 665; *Spartanburg County v. Arthur*, 180 S. C. 81, 185 S. E. 486; *Temple v. McKay*, 172 S. C. 305, 174 S. E. 23; *Fishburne v. Fishburne*, 171 S. C. 408, 172 S. E. 426; *Gregg Dyeing Co. v. Query*, 166 S. C. 117, 164 S. E. 588, affirmed 286 U. S. 472, 52 S. Ct. 631, 76 L. Ed. 1232, 84 A. L. R. 831; *Winn v. Harby*, 166 S. C. 99, 164 S. E. 434; *Tallevast v. Kaminski*, 146 S. C. 225, 143 S. E. 796.

Perhaps the clearest statement of that principle is contained in *Gregg Dyeing Co. v. Query*, *supra*, 166 S. C. at pages 123-124, 164 S. E. at page 590:

"It is a settled rule of statutory construction that it is the duty of the court to ascertain the intent of the Legislature and give it effect so far as possible within constitutional limitations. When a statute is a part of other legislation, designed as a whole to establish an expressed state policy, the court should strive to effectuate that policy. To aid in its construction, the statute must be read in the light of cognate legislation. *Tallevast v. Kaminski*, 146 S. C. 225, 143 S. E. 796. And, in construing statutes on the same subject, 'they shall be taken together, and construed *in pari materia*; even though there be no express reference by the latter statute to the former.' *State v. Fields*, 2 Bailey 554, 25 R. C. L., p. 1060. See, also, *Columbia Gaslight Co. v. Mobley*, 139 S. C. 113, 137 S. E. 211.

" 'The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes that are contemporaneous.' 25 R. C. L., 1062.

"This Court has said: 'There is no rule better supported by justice and wisdom than that, when there are several acts on the same subject, they should be read together as *one act*, so far as their provisions are consistent; as by this means, the mischief, the remedy, and the intention, of the legislature, are more distinctly seen and applied.' (Italics ours.) *Richards v. McDaniel*, 2 Mill Const. 18.

“While, as a general rule, reference to statutes *in pari materia* for purposes of construction has been made largely where there is *ambiguity* in the language of the statute construed, yet this principle has not been limited solely to such instances.

“ ‘Statutes *in pari materia* must be construed together and given a construction, if possible, which violates no constitutional provision’ (Syllabus). *Neil v. Independent Realty Co.*, 317 Mo. 1235, 298 S. W. 363, 70 A. L. R. 550.

“Again: ‘These two acts are cognate parts of a single purpose—the liquidation and retirement of designated road and bridge bonds—in the accomplishment of which purpose the provisions of the two acts are inextricably interrelated. They should therefore be construed *in pari materia* as one enactment.’ (Italics ours.) *Amos v. Mathews*, 99 Fla. 1, 126 So. 308, 313.”

The term “grade separation structure” is used not only in Article 11 but in several instances in Article 10 of the same Chapter entitled “Elimination of Grade Crossings at Instances of Others Than Commission.” Article 10 deals with the original construction of a “grade separation structure” whereas Article 11 deals with the reconstruction, change or alteration of such a structure. Section 58-813 of Article 10 speaks of “* * * the elimination of any grade crossing by means of a grade separation structure * * *.” Section 58-815 of Article 10 applies to the material to be used in the construction of “the grade separation structure.” Section 58-816 of Article 10 provides a scheme for the division of the costs “of the elimination of the grade crossings by means of grade separation structures.” Section 58-820 of Article 10 requires that the Highway Department’s share of the cost be appropriated or arranged for before the railroad can be required to proceed with the construction “of such grade separation structure.” Section 58-821 allows an appeal by the railroad from an order of the Highway Department requiring it to provide “a grade separation structure.” Section 58-823 of Article 10 authorizes the Highway Depart-

ment during the appeal to proceed at its own risk with the construction of the "grade crossing separation structure." And Section 58-824 of Article 10 provides that grade crossings replaced by "grade separation structures" and no longer used by the general public may be continued only as private crossings.

Article 10 was enacted by the Legislature in 1924. Article 11 was enacted in 1932. When the two Articles are considered together, it is manifest that in enacting Article 11 the Legislature used "grade separation structure" as a term with an established meaning.

There are three reported cases in South Carolina construing the analagous sections of Article 10 which throw much light on the type of structures intended to be covered by that Article. The first of these cases was *State ex rel. State Highway Department v. Piedmont & N. Ry. Co.*, 186 S. C. 49, 194 S. E. 631, involving an action brought by the State Highway Department to recover part of the construction cost of a bridge over the railroad's tracks. The action involved Section 8438, Code of Laws of South Carolina, 1932. (Sections 58-813 and 58-814 of the 1952 Code.) The latter provide:

"§ 58-813. Notice to railroad and effort to agree on plans.

"Whenever any such subdivision or department of the State government as is mentioned in § 58-812, having jurisdiction, may determine upon the elimination of any grade crossing by means of a grade separation structure, prompt notice shall be given to the railroad company owning or operating the railroad involved. Within ten days thereafter the representatives of the department and of the railroad involved shall meet and adopt a layout, with the grades and alignments mutually satisfactory." (Emphasis added.)

"§ 58-814. Procedure when agreement not reached.

"Failing to agree, the department or subdivision may order the railroad involved to proceed with the construction of such a structure as it may require as indicated in plans

and specifications accompanying its order. The railroad shall begin work thereon within sixty days after receipt of such order and shall complete the structure within a reasonable time."

An order of nonsuit against the Highway Department was affirmed upon the grounds, first, that the Statute of Limitations had run on the action, and second, that the cited statutory sections do not apply where no grade crossing is eliminated. On the latter point, the Court said:

"* * * (U)nder the facts of this case, as disclosed by the record, the statute under which plaintiff seeks to hold defendant liable for a share of the cost of constructing the bridge is not applicable.

"We think the motion must be granted on this ground.

"The title of the act under which the proceeding is brought is in these words: 'Act to Establish a Uniform Basis for the Elimination of Grade Crossings.' Act March 8, 1924, 33 St. at Large, p. 1057.

"In this case there was no grade crossing at the place where the bridge was constructed. As a matter of fact, there was no road there. The Highway Department set out to build a new road at that point to extend from Greenville to Easley and beyond. Already there was such a road, known as Road No. 2, which was at that time a part of the system of state highways. This road, some hundreds of feet north of the new road, No. 13, crossed the tracks of the defendant railroad on a sound wooden bridge. South of the location of the new road No. 13 was another road crossing the railroad tracks at grade. The old road No. 2 has been removed from the state highway system, but it remains and is used as a county road. The road south of No. 13 remains and is also used as a county road and still crosses the railroad at grade. Thus it is seen that no grade crossing has been eliminated. The Highway Department has built a new road, No. 13; it had to cross the defendant's tracks, and it was necessary to build a bridge over the tracks. In order to make the railroad company liable for its share of the cost of constructing such

bridge, it must be shown that its construction effectuated the elimination of grade crossings over its tracks. The evidence is conclusive that no grade crossing has been eliminated.

"It is clear that the act in question does not apply in these circumstances; that the defendant is not liable for any part of the costs of construction of the bridge." 194 S. E. at pages 635-636.

The next case was *State ex. rel. State Highway Department v. Southern Railway Co.*, 186 S. C. 315, 195 S. E. 633. The Highway Department sought to have the railroad pay part of the cost of a replacement overhead bridge crossing the railroad's tracks and a river. A nonsuit against the Highway Department was affirmed. After deciding the case primarily upon procedural grounds, the Court added:

"It seems plain to us that this is not such a grade-crossing elimination project as comes within the intent and purpose of the act of 1924 * * * which provides a uniform plan for the elimination of grade crossings throughout the state. The testimony and the profiles and maps in evidence show that the primary object of this project was to construct a new bridge over Saluda River at Chappels. * * * Clearly, this was the moving consideration which induced the placing of the bridge at this point. The elimination of the grade crossing was an incident thereto." 195 S. E. at page 637. (The cited Act of 1924 is now Article 10 of Chapter 10, Title 58, Code of Laws of South Carolina, 1952)

The third case is *Powell v. Greenwood County*, 189 S. C. 463, 1 S. E. (2d) 624. This was an action by the receiver of a railroad to recover from a county the cost of repairing a bridge spanning a cut in which the railroad's track lay. The track had been laid many years before the road was built. When the county put in the road, the railroad built the bridge over its track and maintained it, until it was replaced by a new bridge paid for equally by the county and the railroad. The railroad repaired the bridge and sought reimbursement under Article 10 pertaining to the elimination of grade crossings.

The Circuit Judge, in an opinion reproduced in the Supreme Court's *per curiam* opinion, held that Article 10 did not apply:

“‘I am of the opinion that Sections 8437 to 8447 apply only to the elimination of existing grade crossings. These sections are in derogation of the common law and therefore will have to be strictly construed. It is my opinion that it would not apply to a case of this kind * * *’” 1 S. E. (2d) at page 625. (The cited Sections are from the 1932 Code, now Article 10 of Chapter 10, Title 58, Code of Laws of South Carolina, 1952.)

The meaning of Articles 10 and 11 seems very clear. The first authorizes the elimination of grade crossings by means of grade separation structures and provides a scheme for the apportionment of costs between the Highway Department and the railroad. The second article authorizes the reconstruction, change or alteration of such structures, the same structures originally built pursuant to the first article, and provides a similar, but not identical, scheme for the apportionment of costs.

The distinction between the bridge in question and a grade separation structure is more than a technical one. The difference is substantial. A grade separation structure has for its purpose the promotion of safety and convenience from hazards partly of the railroad's making. The Legislature must have felt that the railroad could legitimately be required to bear a part of the cost of that type of structure, which expense it could recoup over a period of years from faster time schedules and the elimination of costly grade crossing accidents. The type of structure involved in this case did not eliminate any hazards, for there were none. No benefits inured to the railroad from this bridge.

I have considered the question from all approaches, including what I believe to be the common sense approach, and in each instance the answer is the same. The action of the Highway Department exceeded its authority.

I have also heard argument as to grave constitutional
5 questions of property rights which would have to be considered if Article 11 were applicable. I am impressed with the force of the railroad's argument, and I think that there is indeed a trend away from imposing such costs on the railroad (See *City of Winston-Salem v. Southern Railway Co.*, 248 N. C. 637, 105 S. E. (2d) 37). However, in view of the conclusion already reached, I find it unnecessary to consider the constitutional issues, because of the rule that constitutional questions will not be determined, unless their determination is essential to a disposition of the case.

I respectfully recommend that the relief sought by Petitioner be granted.

17694

Clara H. DAVIS, Respondent, v. W. R. CORDELL, Appellant
(115 S. E. (2d) 649)

Action by vendor to have contract for sale of land adjudged void for uncertainty and cancelled because of purchaser's failure to perform within reasonable time. The County Court, Greenville County, W. B. McGowan, J., rendered judgment vacating the contract because of purchaser's delay, and purchaser appealed. The Supreme Court, Legge, J., held that under the contract for sale of land, which provided no precise date for payment of price, where vendor had several times demanded "some money" from purchaser but had never notified purchaser of any definite time after which, upon his failure to pay, vendor would rescind, vendor was not entitled to rescission on theory that purchaser had failed to perform by paying within reasonable time.

Reversed.

1. CANCELLATION OF INSTRUMENTS.—Although trial judge stated that he would not pass on validity of contract for sale of land, resolution of issue of validity against vendor's claim of invalidity was

implicit in judge's holding that the contract should be cancelled for failure of purchaser to perform within reasonable time.

2. **VENDOR AND PURCHASER.**—Where payment of price was to be made on basis of acreage, not location of 12½-acre portion of original 17.7-acre tract, failure to locate one-half to one acre lot, which was to be retained by vendor, more precisely than as being “on the Lions Club Road” did not render contract void for vagueness and uncertainty.
3. **VENDOR AND PURCHASER.**—Under contract providing for sale of 12½-acre portion of 17.7-acre tract at price of \$500.00 per acre, and that seller would convey such lots as purchaser should desire prior to payment of full price provided that purchaser should pay \$500.00 for each lot, there was no indefiniteness or uncertainty as to price, and purchaser, upon paying \$500.00, could not have demanded conveyance of lot larger than one acre, and therefore, although area of lots to be conveyed was not specified, there was no fatal uncertainty in the provision for conveyance of a “lot”.
4. **VENDOR AND PURCHASER.**—Where contract for sale of land was devoid of certainty as to time for payment of price, contract was not void but reasonable time for payment would be implied.
5. **CONTRACTS.**—Breach of contract, to justify rescission, must be so substantial and fundamental as to defeat the purpose of the contract.
6. **CONTRACTS.**—Where contract specifies no precise date for payment of price, delay in such payment will not give rise to right of rescission unless it be such as to warrant conclusion that party delaying does not intend to perform.
7. **VENDOR AND PURCHASER.**—Even if some payment by purchaser within eight months after execution of contract for sale of land, which provided no precise date for payment of price, was so substantial and fundamental a requirement of contract that purchaser's failure in that regard might have justified vendor in seeking rescission, such failure did not in itself rescind contract or terminate purchaser's right under it, but vendor had duty, if she intended to rescind, promptly and unequivocally to notify purchaser of such intention.
8. **CONTRACTS.**—Rescission is an equitable remedy, and where one party to a contract that fixes no time for its performance by the other seeks to rescind because of delay in such performance, equitable considerations are especially appropriate.
9. **VENDOR AND PURCHASER.**—Where no time is fixed in contract, party who is to make conveyance will not be permitted, on that account, to trifle with interests of the opposite party by unnecessary delay, and it is in power of opposite party to fix some reasonable time, not capriciously unreasonably, or for purpose of surprising con-

- veying party and thus getting clear of the bargain, but a reasonable time, according to circumstances of the case within which opposite party will expect title to be made, at peril of rescission.
10. **CONTRACTS.**—Courts are reluctant to enforce penalties and forfeitures in matters of contract.
 11. **CONTRACTS.**—Notice of intention to rescind contract is only necessary when party to contract proceeded against has merely delayed in performance, not where he has abandoned the contract, treated it as terminated, or refused to perform.
 12. **VENDOR AND PURCHASER.**—Under contract for sale of land, which provided no precise date for payment of price, where vendor had several times demanded "some money" from purchaser but had never notified purchaser of any definite time after which, upon his failure to pay, vendor would rescind, vendor was not entitled to rescission on theory that purchaser had failed to perform by paying within reasonable time.

Messrs. Hinson & Hamer, of Greenville, for Appellant, cite: As to time not being the essence of this contract: 49 S. E. (2d) 588, 213 S. C. 410; 236 S. C. 195, 113 S. E. (2d) 528. As to there being no evidence of probative value to sustain the finding that Defendant did not act within a reasonable time: 113 S. E. (2d) 329; 226 S. C. 484, 85 S. E. (2d) 739; 213 S. C. 401, 49 S. E. (2d) 588; 1 Des. Eq. (1 S. C. Eq.) 382; 35 S. C. 314, 14 S. E. 714; 51 S. C. 555, 29 S. E. 403; 57 A. L. R. 1290; 24 N. E. 871; 49 N. W. 801. As to rule that a tender must be made before the commencement of the action; otherwise, facts occurring thereafter will not be considered: 26 S. C. 337, 2 S. E. 121; 107 S. C. 393, 93 S. E. 141.

Messrs. Bolt & Cox, of Greenville, for Respondent, cite: As to vendee not acting within a reasonable time, under contract here at issue: 91 C. J. S. 875; 213 S. C. 401, 49 S. E. (2d) 588; 91 C. J. S. 993, 66 C. J. 682; 232 S. C. 185, 101 S. E. (2d) 492; 230 S. C. 174, 95 S. E. (2d) 879; 53 S. C. 563, 31 S. E. 630; 127 S. C. 225, 120 S. E. 834; 222 S. C. 324, 72 S. E. (2d) 531; 108 S. E. 107, 116 S. C. 263; 107 S. E. 320, 116 S. C. 97; 91 C. J. S. 875. As to tender, or restoration, not being a condition precedent to the right to maintain the action for cancellation:

12 C. J. S. 1006; 212 S. C. 51, 46 S. E. 540. *As to the Court having no power to alter the contract by fixing the time of performance*: 5 S. E. (2d) 174, 191 S. C. 486; 42 S. E. (2d) 537, 210 S. C. 366. *As to the written contract being too vague and indefinite, as to the description of the parcel of land to be conveyed, in that it cannot be identified with reasonable certainty*: 66 C. J. 537; 13 Rich Eq. 250; 118 S. C. 449, 110 S. E. 676; 181 S. C. 76, 186 S. E. 695; 208 Ga. 855, 69 S. E. (2d) 723; 8 S. E. (2d) 374. *As to the contract being too uncertain as to the time of payment of the consideration, or payment at all, in that the contract does not fix the price or the consideration clearly, definitely and unambiguously*: 81 C. J. S. 494; 49 A. L. R. 1464; 68 A. L. R. 1216; 33 N. J. Eq. 650; 32 S. C. 528.

August 5, 1960.

LEGGE, Justice.

Respondent, owner of a parcel of land in Greenville County, sought in this action to have a contract for the sale of it to appellant: (1) adjudged void for uncertainty, and (2) cancelled because of alleged failure on appellant's part to perform within a reasonable time certain acts necessary for consummation of the sale. Appeal is from an order of the County Court vacating the contract because of appellant's unreasonable delay. Respondent urges invalidity of the contract as an additional ground for sustaining the judgment.

The challenged instrument, which was signed by both parties on December 23, 1958, was attached to the complaint as an exhibit, and reads as follows:

"Contract

"State of South Carolina

"County of Greenville

"This agreement entered into by and between W. R. Cordell, hereinafter known as the purchaser and Clara H. Davis, hereinafter known as the seller:

“Witnesseth:

“In and for the considerations hereinafter expressed, the seller agrees to sell and the purchaser agrees to buy that certain tract of land in the County of Greenville, State of South Carolina in the Berea Section containing approximately 12½ acres, more or less, and being the 17.7 acre tract inherited from O. R. Davis, less approximately 4 acres conveyed to the Lions Club in deed book 545 at page 59 and less approximately ½ to 1 acre to be retained by the seller on the Lions Club Road and being described as follows: Beginning at an iron pin 199.98 feet on the Lions Club Road and running thence N 30-30 W, 66 feet; thence S 59 W, 1,000 feet, more or less, to an iron pin; thence S 45 E, 288.5 feet to an iron pin; thence S 62 E, 615.8 feet; thence along the Lions Club property N 55-14 E, 605 feet; thence N 30-30 W, 573 feet.

“It is understood and agreed that an accurate survey shall be made and that based thereupon the purchaser shall pay the sum of \$500.00 per acre for said property.

“The seller does hereby acknowledge receipt of \$100.00 down, binding this contract, as part payment for the tract after same is conveyed and the method of payment will be as follows: the purchaser is desirous of cutting said property into lots and for each lot released by the seller to the purchaser the sum of \$500.00 shall be paid which shall be applied on the total purchase price to be determined by the survey and total acreage.

“The seller does hereby grant unto the purchaser a right-of-way and easement for purposes of ingress and egress over the northern 15 feet of the tract retained by seller so as to connect this property with the Lions Club Road.

“It is understood by and between the parties to this contract that once the entire consideration has passed the seller will convey unto the purchaser any and all property not conveyed at that time and the seller will convey such lots as desired by the purchaser prior to the payment of the full

purchase price provided the purchaser shall pay unto the seller the sum of \$500.00 for each lot.

"Witness the hands and seals of the parties hereto binding ourselves, our heirs, successors and assigns this 23rd day of December, 1958."

The complaint, dated August 27, 1959, after alleging that, except for the payment of \$100.00 made when the contract was signed, the defendant had paid the plaintiff nothing, proceeds as follows:

"IV. That the plaintiff is informed, believes and alleges that said contract is so vague, uncertain, and does not sufficiently identify and describe the subject-matter of said contract and sale, and has no limitation as to time of performance that it is unenforceable, invalid and void; that an unreasonable time has elapsed since the execution of said contract and plaintiff alleges that she is entitled to have said instrument, which is a cloud upon her title, cancelled and surrendered; that the plaintiff has no adequate remedy at law to remove said cloud or to enforce disaffirmance of said contract.

"V. That the defendant has entered upon, and threatens to continue to trespass upon her property for the laying out and cutting of streets and roads on said property under this invalid and void contract, and unless restrained and enjoined he will continue to do so.

"VI. That the plaintiff has been damaged in the sum of fifteen hundred (\$1,500.00) dollars less the one hundred (\$100.00) dollars paid by the defendant at the time of the execution of said alleged invalid and void contract.

"Wherefore plaintiff prays:

"1. That a Rule to Show Cause do issue requiring defendant to show cause, if any he has, why he should not be restrained from entering upon her property.

"2. That the court do issue an order that the contract signed on the 23rd day of December, 1958, be declared invalid and void and surrendered.

"3. That the plaintiff have judgment against the defendant in the sum of one thousand four hundred (\$1,400.00) dollars.

"4. For the costs of this action."

The record before us makes no mention of any answer to this complaint. It appears that on August 27, 1959, the court, upon consideration of the complaint, issued a temporary restraining order and a rule requiring the defendant to show cause on September 1, 1959, why an injunction *pendente lite* should not issue; and that the defendant filed a return to the rule, requesting that the temporary restraining order be revoked and the temporary injunction refused, upon the following grounds:

"1. The contract to purchase is valid and binding on both parties.

"2. That the contract shows on its face that it is a binding contract to purchase real estate and time is not of the essence. The attached affidavits substantiate that time was not of the essence.

"3. That W. R. Cordell, the purchaser, acted with due diligence and was performing the contract within a reasonable time.

"4. That the acts of the plaintiff in refusing to permit the surveyor to complete the survey and applying for this temporary restraining order is delaying the completion of this contract.

"5. That under the conditions and circumstances surrounding this transaction equity should require plaintiff to carry out her portion of the agreement."

The affidavits referred to will be discussed later; they were by the defendant Cordell, Clifford C. Jones, and J. Mac Richardson. The agreed statement in the transcript is to the effect that "the matter came on to be heard by the County Judge on the merits on November 6, 1959"; that testimony of the defendant was not transcribed, but was in accord with his affidavit before mentioned; that Mr. Jones and Mr. Rich-

ardson submitted their affidavits, before mentioned, as their testimony; and that the hearing was then adjourned to November 23, 1959, at which time the plaintiff's affidavit (to which we shall shortly refer) was accepted as her testimony, and her daughter, Mrs. Wyatt, testified orally. We summarize below the evidence thus presented to the trial court.

W. R. Cordell, the defendant: that he has been engaged in the real estate and contracting business for about thirteen years, during which time he has purchased many lots in Greenville County, has developed some subdivisions, and has built and sold numerous homes. That for about two years prior to the transaction here involved Mrs. Davis had been coming to defendant's office, trying to sell the property to her nephew for \$500 per acre; and that shortly before Christmas, 1958, the nephew having declined to purchase it at that price, Mrs. Davis and her daughter Mrs. Wyatt came to defendant's office and urged him to purchase it, saying that they needed \$100 for the Christmas holidays. That defendant agreed to purchase the property and to pay for it as provided in the contract attached to the complaint. "That Mrs. Davis told him that she did not want all of the money paid at one time because of income tax she would be required to pay and that she preferred to have the money coming in at various times in accordance with the agreement in order that she might live on the money." That defendant engaged an attorney, gave him the information concerning the oral agreement between the parties, and asked him to draw the contract accordingly; that on the day of its execution Mrs. Davis and Mrs. Wyatt arrived at the attorney's office before the defendant; that upon defendant's arrival the attorney read the contract and all agreed to it; and that thereupon it was signed and defendant made the cash payment of \$100 which up to the time of the hearing on November 6, 1959, plaintiff had not repaid or tendered to him. That shortly after Christmas, 1958, defendant met with Mr. C. C. Jones, a civil engineer, on the property and, Mrs. Davis having given defendant a plat of it dated October 6, 1918, Mrs.

Davis' daughter, Mrs. Wyatt, went over the property with Mr. Jones and pointed out all corners to him. That thereafter in July, 1959, Mr. Jones not having completed his survey despite defendant's urgings, defendant engaged another surveyor, Mr. J. Mac Richardson, who, according to defendant's information, went to the property on August 27, 1959, to survey it, but was stopped by Mrs. Davis. That had Mrs. Davis not stopped him, Mr. Richardson could have completed the laying out of this property in time to have submitted it to the Planning and Zoning Commission at its meeting on September 7, 1959, for its approval as required by law. That defendant has incurred considerable expense, and will incur additional expense and loss because of Mrs. Davis' acts; and that in May or June, 1959, when defendant had a Mr. Quinn use his bulldozer to clear up some trees and undergrowth to assist Mr. Jones with his surveying, neither Mrs. Davis nor her daughter made any complaint. That if the court will permit him to proceed, defendant will be able to pay Mrs. Davis \$2,000 for the release of four lots immediately after the survey has been completed and the plan approved by the Planning and Zoning Commission, which according to his information will entail a delay of about three additional months. That if permitted to go forward, defendant will have to spend about \$5,000 for making the survey, laying out the lots, and installing water pipes, etc., which he is ready, able and willing to do.

C. C. Jones, Civil Engineer: That shortly after his employment by the defendant, he met the latter at the premises; that Mrs. Davis gave the defendant a plat of the property surveyed by W. A. Hester, October 6, 1918; that Mrs. Wyatt walked over the property with the witness and pointed out the boundaries and corners; that in connection with the survey and laying out of the subdivision witness went on the property a number of times during the next few months, but because of prior commitments was unable to complete his survey prior to July, 1959, when the services of another surveyor were obtained. That during this time defendant called

the witness several times and urged him to complete the project.

J. Mac Richardson, Registered Land Surveyor: That for the past two years he has had more surveying work than he could keep up with, and he is informed and believes that a like situation exists with other surveyors and engineers in connection with subdivision work. That about July, 1959, defendant urgently requested him to lay out the subdivision for him; and, because of the pressure of the friendship between the witness and a gentleman who was interested in defendant's behalf, the witness, who in the normal course of things could not have reached defendant's project for three months, gave it priority and went on the property to survey it on August 27, 1959, with the intention of completing the survey before September 7, 1959, when the Zoning Board would meet; and that after he had started the survey Mrs. Davis ordered him to stop. That in the opinion of the witness the lapse of time after December 23, 1958, the date of the contract, was not unreasonable or unusual.

Mrs. Clara H. Davis, the plaintiff: That she had never gone to defendant's office until December 23, 1958, the date upon which the contract was signed; that defendant understood that she needed money for living expenses and assured her that commencing in the early part of 1959 a portion of the money stated as consideration in the contract would be paid from time to time in instalments; that in January or February, 1959, she demanded that he make arrangements to pay her some money under the contract, but without result; that she and her daughter went to see him several times thereafter in an effort to obtain some payment, and on each occasion he stated that he was without funds; that it was not until the latter part of July that someone went on the edge of her property with a bulldozer, she being away from home at the time; that, after being convinced that the defendant could not comply with the contract within a reasonable time, she sought counsel and was advised that she had the right to terminate the contract, which she elected to do;

and that she "does now (September 1, 1959) tender unto the said W. R. Cordell, or his attorney, and pay into court the sum of one hundred (\$100.00) dollars", although she has sustained damage in excess of that amount.

Mrs. Sadie Wyatt, plaintiff's daughter: That she and her mother went several times to defendant's office to get money on the contract, but were told by him that he did not have the money. That she did not point out all of the stakes on the property to Mr. Jones; and that she does not know where he obtained the plat of it.

The complaint here jumbles two inconsistent causes
1 of action: one attacking the contract as void because of vagueness and uncertainty, the other seeking rescission and damages. The latter assumes a valid contract; the theory of the former is that there was no contract. But election between the two was not demanded, and they were tried together. In the order under appeal the trial judge, holding that the plaintiff was entitled to rescind, stated that he would not pass upon the issue of invalidity; but that he did resolve that issue against the plaintiff's contention is implicit in his holding, for there can be no rescission of a non-existent contract.

In our opinion the contract in question reveals no
2, 3 such vagueness and uncertainty as would render it void. It described the property sufficiently to identify it. Since from the original tract of 17.7 acres that had come into plaintiff's ownership by inheritance approximately four acres had been conveyed by her to the Lions Club and she was also to retain approximately one-half to one acre on the Lions Club Road, it properly provided that an "accurate survey" should be made in order to determine precisely the metes and bounds of the remaining twelve and one-half acres more or less. We do not think that failure to describe and locate more precisely the lot to be retained by the seller was fatal to the contract, in view of the fact that payment by the purchaser was to be made on the basis of the acreage, not

the location, of the remainder of the tract. There is nothing so indefinite about the amount of the purchase price as would warrant our declaring the contract void for uncertainty in that regard. Nor do we find fatal uncertainty in the provision for conveyance of lots upon payment by appellant of \$500 for each. It is true that in this provision the area of a lot so to be conveyed is not specified; but if that clause is construed in connection with the earlier one fixing the purchase price at \$500 per acre, it would seem clear that the appellant, upon paying \$500, could not have demanded conveyance of a lot larger than an acre.

As to the time for payment of all or any part of the
4 purchase price (other than the down payment of \$100), the contract is completely devoid of certainty. For all that appears on its face, appellant or his heirs or assigns could have deferred payment as long as they might wish, for no obligation to pay was to arise until he or they might desire to have one or more lots conveyed to him or them or another. Uncertainty in that regard does not, however, render the contract void; a reasonable time will be implied. *Butler v. O'Hear*, 1 Desaus. Eq. (1 S. C. Eq.) 382; *McMillan v. McMillan*, 77 S. C. 511, 58 S. E. 431; *Speed v. Speed*, 213 S. C. 401, 49 S. E. (2d) 588. We conclude, then, that the trial judge was correct in treating the contract as not void and in proceeding to consider the result, upon appellant's rights and those of respondent, of the former's delay in doing those things which the contract contemplated that he would do in order to effect payment of the purchase price within a reasonable time.

Breach of a contract, to justify its rescission, must
5, 6 be so substantial and fundamental as to defeat the purpose of the contract. 12 Am. Jur., Contracts, Section 440; 17 C. J. S., Contracts, § 422; *Pearson v. Matheson*, 102 S. C. 377, 86 S. E. 1063; *Childress v. C. W. Myers Trading Post, Inc.*, 247 N. C. 150, 100 S. E. (2d) 391. Here the contract specified no precise date upon which appellant was required to pay the balance of the purchase price;

by presumption of law, he was required to do so within a reasonable time. In such a case mere delay in performance will not give rise to the right of rescission unless it be such as to warrant the conclusion that the party delaying does not intend to perform. 12 Am. Jur., Contracts, Section 441; 17 C. J. S., Contracts, § 422; *Luce v. New Orange Industrial Association*, 68 N. J. Law 31, 52 A. 306; *Shpargel v. Emerson Land Co.*, 258 Mich. 222, 241 N. W. 891.

Assuming, as may be inferred from the order under 7-9 appeal, that in the circumstances of this transaction payment within a reasonable time, and some payment within eight months, after its execution was so substantial and fundamental a requirement of the contract that appellant's failure in that regard might justify the respondent in seeking its rescission, such failure on appellant's part did not in itself rescind it or terminate appellant's rights under it. It was respondent's duty, if she intended to rescind, promptly and unequivocally to notify appellant of her intention to do so. 12 Am. Jur., Contracts, Section 446; 17 C. J. S., Contracts, § 435; *Mennessy v. Bacon*, 137 U. S. 78, 11 S. Ct. 17, 34 L. Ed. 605; *Taylor v. Goelet*, 208 N. Y. 253, 101 N. E. 867, Ann. Cas. 1914D, 284; *Lebanon Valley Iron & Steel Co. v. American Shipbuilding & Dock Corp.*, 4 Cir., 279 F. 859. For rescission is an equitable remedy; and where one party to a contract that fixes no time for its performance by the other seeks to rescind it because of the latter's delay, equitable considerations would seem especially appropriate. In *Thompson v. Dulles*, 5 Rich. Eq. (26 S. C. Eq.) 370, the Chancellor's decree, approved on appeal, stated the following principle which, applied there to one who had contracted to convey, is no less applicable to one who has contracted to purchase:

"On the other hand, where no time is fixed in the contract, the party who is to make the conveyance will not be permitted, on that account, to trifle with the interests of the opposite party by unnecessary delay; and it is in the power of that party to fix some reasonable time—not capriciously

or unreasonably, or for the purpose of surprising him, and thus getting clear of the bargain, but a reasonable time, according to the circumstances of the case—within which he will expect the title to be made, at the peril of rescinding the agreement.

“These principles are clear. There is no mystery about the doctrine. Good faith is to govern in all cases.”

The rule is well expounded in *Taylor v. Goelet*, *supra*, 10, 11 from which we quote [208 N. Y. 253, 101 N. E. 868]:

“The basis of the rule requiring notice of intention to rescind is to be found in the reluctance of the courts to enforce penalties and forfeitures in matters of contract. The courts generally require the party complaining of a breach of contract to prove his actual damages and limit his recovery to the amount thereof. Courts do not allow a rescission of the contract for mere delay in performance unless the parties have made time of the essence of the contract * * *. The rule would seem to apply as aptly to contracts which when made leave indefinite the time of performance as to contracts from which time as an essential element has been removed by acquiescence of the parties. Time is not of the essence of a contract which is to be performed within a reasonable time, but either party can make it so, whenever he desires, by simply giving notice to that effect. If notice is not given, the contract continues in force. It may be sued on as an existing contract and damages for its breach recovered. But it cannot be treated as at an end and a forfeiture enforced * * *. The rule is a just one and is necessary to protect the unwary. It is to be understood, however, that the notice of intention to rescind is only necessary when the party to the contract proceeded against has merely delayed performance, not where he has abandoned the contract, or treated it as terminated, or where he has refused to perform.”

Respondent was bound by her contract to allow appellant a reasonable time for payment of the purchase price. The just and equitable principle before men-

tioned required that, before termination of his rights under the contract by the extreme remedy of rescission, appellant be given express, unequivocal and reasonable notice that unless within a specified time he should pay the purchase price in full or pay a definite part of it and make satisfactory arrangement for the time of payment of the balance, his rights would be so terminated. It appears that on several occasions after its execution respondent made demand upon appellant for "some money" under the contract; but never did she notify him of any definite time after which, upon his having failed to pay, she would rescind it. On the contrary, eight months after the contract had been executed, and without any previous notice of her intention to rescind it, she brought this action and on the same day obtained a temporary restraining order preventing him from proceeding with the survey of the property. Through the injunctive power of the court that restraint has continued ever since.

Respondent's cause of action for rescission falls because she failed to give reasonable notice of her intention to rescind; and the judgment of the County Court must be reversed, but without prejudice to her right, if and when so advised, to institute any action not in conflict with the views herein-before expressed.

Reversed.

STUKES, C. J., and TAYLOR, OXNER and MOSS, JJ.,
concur.

17695

Isiah PORTER, Respondent, v. NEWS AND COURIER COMPANY,
Appellant
(115 S. E. (2d) 656)

Action against newspaper company for alleged libel. The Common Pleas Court, Charleston County, George T. Gregory, Jr., J., overruled defendant's demurrer, and defendant appealed. The Supreme Court, Stukes, C. J., held that com-

plaint was sufficient to state cause of action on theory that newspaper's publication charged plaintiff with crime of larceny or of breach of trust with fraudulent intent, either of which is libelous *per se*.

Affirmed.

1. **LIBEL AND SLANDER.**—Privilege is a matter of defense and is ordinarily not available on demurrer to complaint for alleged libel.
2. **LIBEL AND SLANDER.**—Complaint against newspaper company based on article regarding plaintiff's receiving more than amount of payroll check because decimal in payroll check number caused cashier to make mistake was sufficient to state cause of action for libel on theory that newspaper's publication charged plaintiff with crime of larceny or of breach of trust with fraudulent intent.
3. **LIBEL AND SLANDER.**—Newspaper article regarding plaintiff's receiving more than amount of payroll check because decimal in payroll check number caused cashier to mistake payroll number for amount of check reasonably might be understood to charge plaintiff with crime of larceny or of breach of trust with fraudulent intent, and constituted libel *per se*.
4. **LIBEL AND SLANDER.**—A crime need not be charged *eo nomine* for the words to be actionable, but any words which distinctly assume or imply guilt, or raise strong suspicion of it in the minds of the hearers, are sufficient.

Messrs. Waring & Brockinton, of Charleston, for Appellant, cite: As to the publication of the article containing matter allegedly libelous being privileged and there are no allegations of specific malice in connection with such publication: 116 S. C. 77, 106 S. E. 855; 179 S. C. 208, 184 S. E. 580. As to the matters stated in the article published by the Defendant not being libelous per se, and the complaint sets forth no extrinsic facts from which it could be concluded that the Plaintiff has been degraded or has suffered loss: 76 S. C. 510, 57 S. E. 478; 129 S. C. 242, 124 S. E. 7; 233 S. C. 519, 105 S. E. (2d) 11; 202 S. C. 24, 23 S. E. (2d) 823; 3 A. J. 100, Libel and Slander, Sec. 87; 194 S. C. 370, 9 S. E. (2d) 796, 76 S. C. 510, 57 S. E. 478.

Messrs. Wrighten & Brown, of Charleston, for Respondent, cite: As to trial Judge properly holding that the question of privilege cannot be decided upon demurrer: 208 S. C. 490,

38 S. E. (2d) 641; 141 S. C. 364, 139 S. E. 781; 33 Am. Jur. 149, 150, 151, Secs. 154, 155; 156 S. C. 69; 195 U. S. 138, 49 L. Ed. 128, 24 S. Ct. 808; 104 Am. St. Rep. 130. *As to trial Judge properly refusing to sustain the demurrer:* 179 S. E. 452, 208 N. C. 85; 38 S. E. (2d) 641, 208 S. C. 490; 34 S. E. (2d) 296, 72 Ga. App. 458; 17 S. E. (2d) 150; 198 S. C. 173; 193 S. E. 126, 184 S. C. 525; 33 S. E. (2d) 124, 225 N. C. 33; 182 S. E. 889; 178 S. C. 278; 6 S. E. (2d) 750, 192 S. C. 373; 193 S. E. 126, 184 S. C. 525; 195 S. E. 55, 212 N. C. 780; 95 S. E. (2d) 616, 230 S. C. 304; 105 S. E. (2d) 711, 233 S. C. 519; 67 S. E. (2d) 600, 84 Ga. App. 822; 10 Rich. 414; 10 Am. Dec. 633; 2 Rich. 591. *As to libel being properly pleaded in the complaint:* 129 S. C. 242; 93 S. E. (2d) 457; 192 S. C. 373, 6 S. E. (2d) 750.

Messrs. Waring & Brockinton, of Charleston, for Appellant, in reply, cite: As to the matter of privilege being a legal determination which will be applied on demurrer when there is no factual issue posed by the complaint: 116 S. C. 77, 106 S. E. 855; 179 S. C. 208, 184 S. E. 580; 114 S. C. 48, 103 S. E. 84. *As to the complaint stating no facts from which it could be concluded that the article was libelous either per se or per quod:* 129 S. C. 242, 124 S. E. 7; 17 R. C. L. 393; 76 S. C. 510, 57 S. E. 478; 2 Brev. 480.

August 8, 1960.

STUKES, Chief Justice.

This is an appeal from a *pro forma* order overruling defendant's demurrer to the complaint which is for damages for alleged libel of the plaintiff. It is alleged in the complaint that the following allegedly false matter was published by appellant in its newspaper: Under the replica of a check there was: "A Charleston Man Cashed This Check for \$6.47 * * * But He Ended Up With \$149.63 Decimal In Check number (left) apparently caused cashier to make mistake."

Then followed the headlines :

“Misplaced Decimal Point

“Father Of Twelve Freed After Receiving Too Much
Money For A Payroll Check.”

Then the article, as follows :

“By Glenn Robertson

“News and Courier Staff Writer

“What’s in a payroll check number?

“Plenty, so far as Isiah Porter is concerned.

“Check number 14963, given him by the Woodstock Manufacturing Co. in the Stark Industrial area Sept. 24, 1958, could have been responsible for Isiah’s spending 10 years in jail. All because of a misplaced decimal point.

“But he was freed yesterday to go back to work—and to go back to his wife and 12 children.

“When the all-white jury returned their ‘not guilty’ verdict yesterday afternoon at 3:50, spectators in the court room applauded.

“Isiah’s smile of freedom climaxed a legal battle that had begun yesterday morning in General Sessions Court.

“What apparently happened was this :

“Isiah went into Piggly Wiggly grocery store at Dupont Crossing in St. Andrew’s Parish last September to cash a payroll check for \$6.47.

“The saleslady who cashed the check had been working for the grocery chain for only three weeks.

“She glanced at the check number, 149.63 (the decimal had been put in by the check writing machine), and quickly counted out \$149.63 in Isiah’s hand. Apparently she read the check number as the amount involved.

“Isiah Walked Out Of The Store And During The Following Week Spent \$60.00 Of The Money.

“Did Isiah commit larceny in taking the money?

“Isiah’s attorneys said no. The state said yes.

“So convinced of his innocence was Isiah’s attorney that he asked for a directed verdict of not guilty after the state had presented their case against the 42-year-old Negro. The

motion was denied by presiding Judge Steve C. Griffith of Newberry.

"The break in the trial came, however, when Judge Griffith charged the jury before they retired.

"He said:

" 'Money in this case was not taken—but it was delivered. Therefore the state must have proved that he acquired the property wrongfully. The taking offense must exist at the very time it comes into his possession.

" 'The state must further have proved that he took the money—and at the time of the taking, the defendant knew it was wrong and that he intended to steal it.' "

"If found guilty, Judge Griffith continued, the defendant would be required to serve from three months to ten years at hard labor.

"The jury went out at 3:17 p. m., and delivered the 'not guilty' verdict 38 minutes later.

"What's going to happen to Isiah now?

"His employer, Thomas J. Thorne, general manager of Woodstock says he can come back to work.

" 'He's been drawing about a \$100.00 a month unemployment compensation since October.' Thorne said, 'and he was laid off with the understanding that if he was cleared, he could come back to work.' "

"And how about the check-writing machine that makes numbers look like dollars and cents, he was further asked?

" 'Oh, we replaced it sometime ago,' Thorne concluded."

The contentions of appellant are, as stated in the brief, that the demurrer should have been sustained because the complaint failed to state facts sufficient to constitute a cause of action, in that (1) the publication of the matter allegedly libelous was privileged and there were no allegations of specific malice, and (2) the alleged libelous matter is not libelous *per se* and there were no extrinsic facts alleged from which it could be concluded that the plaintiff had been degraded or had suffered loss by reason of the publication.

With respect to (1) above, privilege is a matter of
 1 defense and ordinarily not available on demurrer.

Rivers v. Florence Printing Co., 141 S. C. 364, 139 S. E. 781; *Kirby v. Gulf Refining Co.*, 173 S. C. 224, 175 S. E. 535; *Moore v. New South Express Lines, Inc.*, 184 S. C. 266, 192 S. E. 261; *Rutledge v. Junior Order United American Mechanics*, 185 S. C. 142, 193 S. E. 434; *Bell v. Bank of Abbeville*, 208 S. C. 490, 38 S. E. (2d) 641; *Drakeford v. Dixie Home Stores*, 233 S. C. 519, 105 S. E. (2d) 711. Annotation, 51 A. L. R. (2d) 552.

Appellant cites two cases in which demurrers were sustained to complaints for libel by newspaper publications of judicial proceedings, on the ground of privilege. The first is *Oliveros v. Henderson*, 116 S. C. 77, 106 S. E. 855, and the other is *Lybrand v. State Company*, 179 S. C. 208, 184 S. E. 580, 104 A. L. R. 1118. However, in neither case was it considered whether privilege is an affirmative defense and has to be pleaded, whereby it is not available on demurrer. On the contrary, in the *Lybrand case* the absence of privilege was alleged in the complaint. See the decisions cited in 51 A. L. R. (2d) 569(b). Neither case is authority against the rule that privilege is an affirmative defense. Incidentally, in the *Oliveros case* it was clearly and repeatedly said that the newspaper or other report of a judicial proceeding, if containing libel, must be an accurate, fair and impartial report of the proceeding, not garbled, added to or taken from and, further, that quoting, "No one has a right to take advantage of the privilege, allowed to make comments injurious to the reputation or business of another." [116 S. C. 77, 106 S. E. 869.]

Turning to appellant's point (2) above, we find it to
 2, 3 be equally without merit. Putting aside the claim of privilege, as we must in the consideration of the demurrer, we think that the alleged publication reasonably may be understood to charge the respondent with the crime of larceny or of breach of trust with fraudulent intent, either of which is libelous *per se*. *Smith v. Brown*, 97 S. C. 239, 81

S. E. 633; *Williamson v. Askin & Marine Co.*, 138 S. C. 47, 136 S. E. 21; *Duncan v. Record Publishing Co.*, 145 S. C. 196, 143 S. E. 31; *Turner v. Montgomery Ward & Co.*, 165 S. C. 253, 163 S. E. 796; *Merritt v. Great A. & P. Tea Co.*, 179 S. C. 474, 184 S. E. 145; *White v. Southern Oil Stores*, 198 S. C. 173, 17 S. E. (2d) 150; *Rogers v. Florence Printing Co.*, 230 S. C. 304, 95 S. E. (2d) 616; *Drakeford v. Dixie Home Stores*, *supra*, 233 S. C. 519, 105 S. E. (2d) 711. See particularly, *Williamson v. Askin & Marine Co.*, *supra*.

It is well settled that a crime need not be charged *eo nomine* for the words to be actionable. *Lily v. Belk's Department Store*, 178 S. C. 278, 182 S. E. 889; *Flowers v. Price*, 192 S. C. 373, 6 S. E. (2d) 750. In several former decisions we have cited with approval the following from Odgers on Libel and Slander (1st Am. Ed.) 116; "It is not necessary that the defendant should in so many words, expressly state the plaintiff has committed a particular crime. * * * Any words which distinctly assume or imply the plaintiff's guilt, or raise a strong suspicion of it in the minds of the hearers, are sufficient."

The order under appeal will be affirmed and appellant may serve its answer to the complaint within twenty days after remittitur is filed in the lower court.

Affirmed.

TAYLOR, OXNER, LEGGE and MOSS, JJ., concur.

17696

Luther Boyd STEPHENS, Respondent, v. Mrs. Kathleen M. COTTINGHAM, Graham Cottingham and Carolina Casualty Insurance Company, of whom Carolina Casualty Insurance Company is, Appellant.

(115 S. E. (2d) 505)

Action against vehicle liability insurer to recover amount of judgment recovered against insured. The Common Pleas

Court of Dillon County, Julius B. Ness, J., rendered judgment for plaintiff and an appeal was taken. The Supreme Court, Oxner, J., held that under exclusionary provision in liability policy covering three tractors, providing that policy would be void in event that more than two of the tractors were operated at any one time, coverage was excluded when all three were exposed at same time to hazard of accident and not only when all three were being used at one time in insured's business, and a tractor was being operated within policy provisions when it was being driven by insured's employee to gasoline station for servicing.

Reversed and remanded.

1. **INSURANCE.**—Provision in vehicle liability policy making it null and void in event that more than two of tractors covered were operated at any one time was to be construed liberally in favor of insured, and any doubt or uncertainty as to its meaning was to be resolved in his favor though court was not at liberty to create an ambiguity where none existed or to change plain and ordinary meaning of language used.
2. **INSURANCE.**—Under exclusionary provision in liability policy covering three tractors, providing that policy would be void in event that more than two of the tractors were "operated" at any one time, coverage was excluded when all three were exposed at same time to hazard of accident and not only when all three were being used at one time in insured's business, and a tractor was being "operated" within policy provisions when it was being driven by insured's employee to gasoline station for servicing.
See publication Words and Phrases, for other judicial constructions and definitions of "Operated".
3. **INSURANCE.**—For purpose of provision in liability policy covering three tractors, making policy void in event that more than two of the tractors were operated at any one time, a tractor continued to be operated during time in which it was stopped at a service station for gasoline or stopped while its driver lunched.

Messrs. Willcox, Hardee, Houck & Palmer, of Florence, for Appellant, cite: As to rule that, in the absence of statutory restrictions, an insurance company may insert reasonable exclusion clauses in its automobile liability policy: 45 C. J. S. 909, Sec. 834. As to the Chevrolet tractor, towing an uninsured trailer, being "used" for the towing of the

trailer at the time accident with the plaintiff occurred: Webster's International Dictionary; 67 C. J. S. 502; 45 C. J. S. 913; 112 F. (2d) 58; 100 S. W. 984, 109 A. L. R. 654; 162 Miss. 237, 139 So. 453; 122 Cal. App. 105, 9 P. (2d) 863; 114 Cal. App. 716, 300 P. 885. As to it not being the province of the courts to construe contracts broader than the parties have elected to make them, or to award benefits where none was intended: 199 S. C. 325, 19 S. E. (2d) 463.

Messrs. W. B. Hawkins and Marion H. Kinon, of Dillon, for Respondent, cite: As to where language used in an insurance contract is ambiguous, or where it is capable of two reasonable interpretations, that construction will be adopted which is most favorable to insured: 227 S. C. 38, 82 S. E. (2d) 602. As to the exclusion clause not excluding coverage unless there was some causal connection between the pulling of the trailer and the collision: 31 A. L. R. (2d) 298; 185 S. C. 169, 193 S. E. 638; 173 S. C. 380, 175 S. E. 849; 204 S. C. 386, 29 S. E. (2d) 482.

Messrs. Willcox, Hardee, Houck & Palmer, of Florence, for Appellant, in Reply.

August 8, 1960.

OXNER, Justice.

This action was brought by Luther Boyd Stephens on a policy of insurance issued by the Carolina Casualty Insurance Company to Graham Cottingham, wherein the Company agreed to pay, on behalf of the insured and within specified limits, all sums which the insured should become legally obligated to pay as damages because of personal injury or death of any person, or damage to property, caused by accident and arising out of the ownership, maintenance or use of three tractors and two trailers named in the policy. Both Graham Cottingham and his wife, Kathleen Cottingham, were joined as codefendants with the Insurance Company but they have no real interest in this controversy.

Early in the afternoon of December 8, 1956, while said policy was in full force and effect, Luther Boyd Stephens,

respondent on this appeal, sustained personal injuries and property damage as a result of a collision between an automobile owned and driven by him and a 1955 Chevrolet tractor owned by Graham Cottingham and driven by one of his employees. This was one of the tractors named in the policy. On March 8, 1957, Stephens brought an action against Mrs. Kathleen Cottingham and Graham Cottingham to recover damages sustained by him as a result of said collision. The defendants requested the Insurance Company to defend said action but it declined to do so on the ground that there was no coverage. They then employed their own counsel and the case was tried in May, 1958, resulting in a verdict against Graham Cottingham alone for the sum of \$6,000.00 which was duly entered in the office of the Clerk of Court for Dillon County.

Having been unsuccessful in collecting said judgment from Graham Cottingham, Stephens brought this action to recover against the Insurance Company the amount of said judgment with interest and costs. The Company denied liability and claimed that coverage was excluded under two provisions in the policy, both of which were set up as affirmative defenses.

The first affirmative defense was that at the time of the accident all three tractors named in the policy were being operated in the business of Graham Cottingham rendering the policy null and void under the following indorsement: "In consideration of the reduced premium charged under this policy, it is hereby understood and agreed that coverage under this policy shall be null and void in the event that more than Two (2) of the tractors covered are operated at any one time since One (1) of the tractors covered is a Spare to be operated only when one of the other tractors is out of service due to mechanical breakdown, repair, or overhaul."

As a second affirmative defense it was alleged that at the time of the accident there was attached to the Chevrolet tractor an uninsured trailer, thereby suspending coverage under a provision in the policy that it would not apply when the

vehicle was "used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the Company."

On the trial of the instant action, the Insurance Company offered no testimony. That of the plaintiff disclosed the following:

Cottingham, who with his wife resided about two miles from Dillon, South Carolina, was engaged in the business of buying and selling livestock. He owned a GMC tractor, a White tractor and a Chevrolet tractor, all three of which were used in his business and insured under the policy. On the afternoon of the accident, one of these tractors with a trailer attached was on its way to Baltimore and the other, with a trailer, returning home from Baltimore. The motor on one of them, apparently the one returning from Baltimore, was giving some trouble. Cottingham intended to stop this tractor at Lumberton, North Carolina to have the motor repaired and replace it with the Chevrolet tractor which had been standing in his yard. With that in view, he directed one of his employees to take the Chevrolet tractor, to which was attached an empty trailer, to Dillon to have it greased and the oil changed. Just as the Chevrolet tractor was being driven from the driveway into the highway, the collision with the automobile of Stephens occurred. At the time of the accident the tractor with the defective motor had not reached Lumberton. The testimony does not disclose exactly where it was enroute but it is undisputed that both the GMC and the White tractors were then being used in the business of the insured.

At the conclusion of the testimony, each party made a motion for a directed verdict. It was agreed between counsel that there was no issue of fact for consideration by the jury and that the question presented was solely one of law as to the proper construction of the policy. Accordingly, the jury was dismissed and the case taken under advisement by the trial Judge who later awarded judgment in favor of Stephens against the Insurance Company for the amount of

the judgment which he had obtained against Cottingham, together with interest and costs. In this order he held that the indorsement on the policy to the effect that it should be null and void "in the event that more than two of the tractors covered are operated at any one time" should be construed as meaning "that the insured would have to be using simultaneously all three tractors in his business for profit as a truck-man", and "that sending an unloaded tractor to a local filling station to be serviced" would not constitute "an operation under the exclusion clause of the policy" with reference to the provision in the policy suspending coverage when a tractor was being used "for the towing of any trailer owned and hired by the insured and not covered by like insurance in the Company", he concluded that the fact that the Chevrolet tractor had attached an uninsured trailer had no causal connection with the accident, since the collision was with the front of the tractor as it moved into the highway and the attached trailer had never left the driveway of Cottingham's home. It was the view of the Court below that such causal connection must be shown to suspend coverage under this provision.

We need only discuss the provision that the policy
1 shall be null and void in the event more than two of the tractors covered are operated at any one time. Under the well settled rule, this provision must be construed liberally in favor of the insured and any doubt or uncertainty as to its meaning must be resolved in his favor, but, of course, the courts are not at liberty to create an ambiguity where none exists or to change the plain and ordinary meaning of the language used. *Inman v. Life Ins. Co. of Virginia*, 223 S. C. 98, 74 S. E. (2d) 423; *Chastain v. United Insurance Co.*, 230 S. C. 465, 96 S. E. (2d) 464.

We do not agree with the Court below that this pro-
2 vision, liberally construed in favor of insured, applies only when all three tractors are being used at one time in insured's business. No such limitation is contained in this indorsement, nor may one be reasonably inferred. It

seems to us that the clear intent was to exclude coverage when all three pieces of equipment were exposed at the same time to the hazard of an accident. A risk of liability exists whenever a tractor is in operation regardless of the purpose for which it is used. It is stated in appellant's brief that by restricting coverage in this manner, the insured was enabled to reduce his premium by approximately \$650.00. The accuracy of the estimation is not material, for at least some reduction was made as evidenced by the recital that the endorsement was "in consideration of the reduced premium charged under this policy." Respondent says that if the insured were only covered when not more than two tractors were in operation, he received nothing for paying a premium on a third and the same protection could have been procured by insuring only two. We do not agree. Under this indorsement he had an *insured* tractor which could be used as a spare when he took one of the other two out of service.

Under the construction we have given this provision, it is quite clear that there was no coverage on the Chevrolet tractor when it collided with respondent's car. At the same time this tractor was in operation, another was enroute to Baltimore and the third returning from Baltimore. It is argued in respondent's brief that appellant failed to prove that the returning tractor was in operation, stating that it might have reached Lumberton prior to the time of the accident. But insured's own testimony is to the contrary. He said that when the accident occurred, one tractor "was on its way to Baltimore and the other on its way back," and that as to the returning tractor with the bad motor, he "*was going* to put it in the shop" and replace it with the Chevrolet tractor. This clearly indicates ~~that~~ at the time of the accident the returning tractor was not "out of service due to mechanical breakdown, repair, or overhaul."

It is true that when the accident happened, one of
3 the other tractors may at that moment have stopped
at a service station for gasoline or the driver may
have stopped somewhere for lunch. But we think the tractor

continued to be operated within the meaning of the policy during such temporary interruption of the trip. Appellant was not required to show that at the moment of the accident all three trucks were in a state of motion.

In *Commonwealth v. Henry*, 229 Mass. 19, 118 N. E. 224, 225, L. R. A. 1918B, 827, the Court, in construing a statute providing a penalty for operating an automobile on a public street between certain hours without lights, the facts showing that the automobile in question had been left standing unattended on a highway by the defendant, said: "The word 'operated' is not, as the defendant contends, limited to a state of motion produced by the mechanism of the car, but includes at least ordinary stops upon the highway, and such stops are to be regarded as fairly incidental to its operation." In *Stroud v. Water Commissioners*, 90 Conn. 412, 97 A. 336, the plaintiff sued to recover damages to his automobile which he had left unattended against the curbing on a highway. The Court found that the automobile was being "operated" at the time of the accident, but that under a statute no recovery could be had by the plaintiff for any damage sustained by reason of such operation, as it appeared that such automobile was not legally registered. In construing this statute, the Court used the following language: "The word 'operation' cannot be limited, as the plaintiff claims it should be, to a state of motion controlled by the mechanism of the car. * * * The word 'operation,' therefore, must include such stops as motor vehicles ordinarily make in the course of their operation." Also, see *Maher v. Concannon*, 56 R. I. 395, 185 A. 907.

Having concluded that the Chevrolet tractor was not covered by the policy when it collided with respondent's car because the other two tractors named in the policy were then in operation, it is unnecessary to determine whether coverage was suspended because this Chevrolet tractor had attached an uninsured trailer.

The judgment of the Court below is reversed and the case is remanded for judgment in favor of appellant under Rule 27.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

17697

Bertha RENEW, Plaintiff-Respondent, v. Herman SERBY and Vacation Wear, Inc., Defendants-Appellants
(115 S. E. (2d) 664)

Married woman's slander action charging that individual defendant made remarks charging her with unchastity. The Common Pleas Court of Aiken County, James M. Brailsford, Jr., J., rendered judgment for plaintiff and defendants appealed. The Supreme Court, Legge, J., held that asserted remarks of managerial employee to married woman who was his subordinate, in which he alluded to her as his girl, stated that she would have to work the next day and assertedly indicated she should refrain from having relations with her husband that night, at best were susceptible of interpretation that, because she would have to work on Saturday, she should refrain from marital intimacy the night before, and, at worse, as suggesting that she forego marital intercourse in favor of illicit relations with the one making the remarks but such remarks were not reasonably subject to construction of charging her with unchastity and were not slanderous *per se*.

Reversed and remanded.

1. **LIBEL AND SLANDER.**—Words which charge a woman with unchastity are slanderous *per se*, and her slander cause requires neither allegation nor proof of special damages.
2. **LIBEL AND SLANDER.**—If language is ambiguous and susceptible of two meanings one slanderous and the other innocent, it must be left to jury to determine, from all attendant circumstances, in what sense speaker used it.

3. **LIBEL AND SLANDER.**—Asserted remarks of managerial employee to married woman who was his subordinate in which he alluded to her as his girl, stated that she would have to work the next day and assertedly indicated she should refrain from having relations with her husband that night, at best were susceptible of interpretation that because she would have to work on Saturday, she should refrain from marital intimacy the night before, and, at worst, as suggesting that she forego marital intercourse in favor of illicit relations with the one making the remarks but such remarks were not reasonably subject to construction of charging her with unchastity and were not slanderous *per se*.

Messrs. Henderson, Salley & Cushman, of Aiken, for Appellants, cite: As to the testimony not being susceptible to the reasonable inference that the language attributed to the individual defendant constituted an imputation of lack of chastity on the part of the plaintiff or of the inference that the plaintiff sustained any damage or injury thereby: 183 S. C. 352, 191 S. E. 67; 213 S. C. 185, 48 S. E. (2d) 808; 219 S. C. 360, 65 S. E. (2d) 468; 202 S. C. 24, 28 S. E. (2d) 823.

Messrs. Williams & Busbee, of Aiken, for Respondents.

August 11, 1960.

LEGGE, Justice.

In this action for slander the jury found for the plaintiff. The defendants charge error in the refusal of their motions for nonsuit, direction of verdict, and judgment *n. o. v.*

During July, 1958, the plaintiff, a young married woman, was employed by the corporate defendant at its plant at New Ellenton, S. C., as an inspector of garments, and the defendant Serby was employed by it in a managerial capacity. Serby was at the New Ellenton plant only one or two days each week, and had little personal contact with the plaintiff or other employees of like status.

The complaint alleged that on July 25, 1958, the defendant Serby, while engaged in his duties at the New Ellenton plant, in the presence of one or more employees "uttered and published verbally of and concerning plaintiff words which

were intended to and did impute to plaintiff a want of chastity, by then and there stating that plaintiff was his (Serby's) girl, requesting that plaintiff refuse to have sexual relations with her (plaintiff's) husband that night; and then uttering the following remark to plaintiff: 'Oh, honey, don't blush like that. Come on back here and let me talk to you.' "

The defendants filed a joint answer, admitting that at the time and place in question a conversation had taken place between the plaintiff and the defendant Serby, but denying that its substance was as alleged in the complaint, and setting forth an entirely different version of the matter.

In support of the allegations of the complaint the plaintiff testified that on the day in question, which was a Friday, when she and Mrs. Mills, another employee, had returned to the plant after lunching together, Serby called them to his desk, where he and one Leonard Whitt, an employee in the shipping department, were seated; that in response to Serby's inquiry as to the progress of the work, plaintiff replied that it was "coming along all right", but that the "make-up", *i. e.*, the amount of production set for each day, was getting very high. From this point we quote her testimony:

"Mr. Serby said don't worry about the make-up, we are not in a rush, we will see about it later. He reached out, he held out his hand and tried to catch my hand. He told the man: 'This is my girl.' I said: 'No, sir, I am not your girl.' He said: 'You will have to work tomorrow.' I said: 'I don't mind working on Saturday.' He said: 'You can break that date tonight.' I said: 'I have a husband I love very much. I have a date with him every night.' He said: 'You go home and tell him he can't have any of that stuff tonight or any night.' Mrs. Mills and I walked away and started to the table to get the material. He hollered and said: 'Come on back, honey, don't blush like that.' I went to my inspector's table and I gathered up my belongings. He was standing in the middle of the floor. I asked him what he meant by talking to me like that. He said he run into all the girls like that. I said: 'Here men don't run on women no such way.' "

Mrs. Mills' testimony corroborated that of the plaintiff except as follows: According to Mrs. Mills, when Serby said of the plaintiff, "This is my girl", he looked at Whitt and laughed. Also, when plaintiff replied that she was not his girl, she turned as if to walk away, whereupon the following transpired: "He said: 'By the way, you are going to have to work tomorrow.' She said: 'I don't mind working; we could use the money.' He said 'By the way, you have a date tonight?' She said: 'Yes, I have a date. I am married, and I keep it with my husband every night.' He said: 'You will have to tell your husband he cannot have any of that stuff tonight, but you will work tomorrow.' Neither of us said anything at that time. We turned and started out towards the back of the building where the work was. He called back to her to come back. He said: 'Hey, honey, come back; don't blush like that; come back.' We kept on walking. I don't know what was said after that. We went right together."

Both Serby and Whitt denied that anything untoward was said; but the testimony of the two women is corroborated by the fact that the plaintiff quit her job immediately and went to report the incident to her husband.

No point is made of the fact that the plaintiff's proof did not bear out, in so many words, the allegation that Serby requested her to "refuse to have sexual relations with her (plaintiff's) husband that night", but showed instead that he used a slang expression. Nor is any question made of her failure to offer proof as to the meaning of the expression used. We take it to be conceded, then, that Serby's words meant, and were understood by those who heard them to mean, that she should refuse to have sexual relations with her husband that night.

Plaintiff alleged, as the foundation of her cause of
1 action, that Serby's words charged her with un-
chastity. If they did, they were slanderous *per se*,
and her case required neither allegation nor proof of special

damage. *Buffkin v. Pridgen*, 154 S. C. 53, 151 S. E. 105; *Stokes v. Great Atlantic & Pacific Tea Co.*, 202 S. C. 24, 23 S. E. (2d) 823.

The rule in this state in slander cases is that if the
2 language is ambiguous and susceptible of two meanings, one slanderous and the other innocent, it must be left to the jury to determine, from all attendant circumstances, in what sense the speaker used them. *Tucker v. Pure Oil Co. of the Carolinas*, 191 S. C. 60, 3 S. E. (2d) 547; *Nettles v. MacMillan Petroleum Corp.*, 210 S. C. 200, 42 S. E. (2d) 57.

Serby's remarks concerning plaintiff's relations with
3 her husband, considered in the circumstances attending their utterance, may, at best (if such a term could be used with reference to them) have been susceptible of interpretation, as a coarse joke, that because the plaintiff would have to work on Saturday she should refrain from marital intimacy the night before. At their worst, they could have been taken as suggesting that she forego marital intercourse in favor of illicit relations with Serby. In whatever light they be studied, they were coarse, indecent, and offensive; but we do not think that they may reasonably be construed as charging her with unchastity. Nor is this view of them changed by the fact that before their utterance Serby had referred to the plaintiff as "my girl". That expression we think was harmless; it carried no suggestion of unchastity; and the phase of the conversation between Serby and the plaintiff in which it was used was brought to an abrupt end by plaintiff's reply. The conversation that followed began with reference to the necessity for working on Saturday, and it ended with plaintiff's departure in proper resentment of Serby's improper comments concerning marital relations between her and her husband; but those comments were not reasonably to be related to his earlier reference to the plaintiff as "my girl".

We think that the trial judge should have directed the verdict for the defendants. The judgment is therefore re-

versed and the cause remanded for entry of judgment under Rule 27.

Reversed and Remanded.

STUKES, C. J., and TAYLOR, OXNER and MOSS, JJ., concur.

17693

Leon WARR, Respondent, v. CAROLINA POWER & LIGHT
COMPANY and J. H. Ryan, Appellants
(115 S. E. (2d) 799)

Fraud and deceit action by vendor of certain real property against purchaser and its agent to recover actual and punitive damages. Defendant moved to strike, and filed demurrer to complaint. The Common Pleas Court, Darlington County, J. Woodrow Lewis, J., overruled motion and demurrer, and defendants appealed. The Supreme Court, Moss, J., held that complaint was insufficient to state cause of action for damages on theory of fraud and deceit in the inducement of the transaction by agent's representation that purchaser was paying only \$60.00 per acre for good cleared land to plant trees on, when in fact purchaser was paying as much as \$200.00 per acre, and property was purchased to create lake in connection with steam plant belonging to purchaser.

Reversed.

1. PLEADING.—In passing upon a demurrer, the court is limited to consideration of pleadings under attack, and all of the properly pleaded factual allegations of such pleadings are for the purpose of such consideration deemed admitted.
2. PLEADING.—Vendor's allegation of fraud and deceit against purchaser of land and its agent was no more than a conclusion of the pleader, and that conclusion was not admitted by demurrer.
3. PLEADING.—A demurrer admits the facts well pleaded in the complaint but does not admit inferences drawn by plaintiff from such facts, and it is for court to determine whether or not such inferences are justifiable.

4. FRAUD.—A plaintiff, to state a good cause of action for fraud and deceit, must allege a representation, its falsity, its materiality, the speaker's knowledge of its falsity, speaker's intent that it should be acted upon by the plaintiff, the plaintiff's ignorance of its falsity, reliance on its truth, plaintiff's right to rely on its truth, and plaintiff's consequent and proximate injury, and if complaint fails to allege facts to support any one of such elements it is fatally defective.
5. FRAUD.—Nondisclosure becomes fraudulent only when it is the duty of the party having knowledge of the facts to uncover them to the other.
6. FRAUD.—Complaint by vendor of certain real property against purchaser of land and its agent was insufficient to state cause of action on theory of fraud and deceit in the inducement of the transaction, by agent's representation that purchaser was paying only \$60.00 per acre for good clear land to plant trees on, when in fact purchaser was paying as much as \$200.00 per acre, and property was purchased to create a lake in connection with purchaser's steam plant, since it did not allege vendor suffered damage.
7. FRAUD.—Purchaser's agent, who stood in no fiduciary relation to vendor, was under no duty to disclose to vendor the intended use.
8. FRAUD.—Where property is worth no more than a vendor receives for it, vendor is not damaged by a vendee's fraud in the procurement of the sale.
9. FRAUD.—In an action for fraud and deceit in the transfer of property, the measure of damage is the difference between the actual and represented value.

Messrs. Spruill & Harris and L. C. Wannamaker, of Cheraw, and A. Y. Arledge and Charles F. Rouse, of Raleigh, for Appellants, cite: As to law applicable to an action for damages for fraud and deceit: 218 S. C. 211, 62 S. E. (2d) 297; 174 S. C. 97, 177 S. E. 29; 190 S. C. 392, 3 S. E. (2d) 38; 234 S. C. 177, 107 S. E. (2d) 43; 234 S. C. 477, 109 S. E. (2d) 5; Restatement of the Law, Contracts, Sec. 470; 55 Am. Jur., Vendor and Purchaser, Sec. 95. As to no consequential injury being alleged: 218 S. C. 211, 62 S. E. (2d) 297; 23 Am. Jur., Fraud and Deceit, Sec. 178; 77 Ark. 261, 92 S. W. 783, 8 L. R. A. (N. S.) 452. As to parol statements being subject to exclusion: 261 S. C. 280, 57 S. E. (2d) 470. As to the order overruling the demurrer herein being appealable, and it is

appropriate for the court, in reviewing that order, to consider all matters involved in the appeal: 216 S. C. 500, 59 S. E. (2d) 132; 231 S. C. 288, 98 S. E. (2d) 530; 233 S. C. 424, 105 S. E. (2d) 521.

Messrs. James P. Mozingo, III, Benny R. Greer and Archie L. Chandler, of Darlington, and Edward E. Saleeby, of Hartsville, for Respondent, cite: As to trial Judge not erring in holding that the complaint states a cause of action, and in overruling the demurrer and denying the motion to strike: 236 S. C. 272, 113 S. E. (2d) 817; 231 S. C. 587, 99 S. E. (2d) 377; 55 Am. Jur. 560; 55 Am. Jur. 563, par. 88; 23 Am. Jur. 857, par. 80; 23 Am. Jur. 870, par. 93, Sec. C.; 50 S. C. 397, 27 S. E. 873; 141 S. C. 98, 139 S. E. 190; 225 S. C. 303, 82 S. E. (2d) 123; 223 S. C. 477, 76 S. E. (2d) 671.

August 4, 1960.

Moss, Justice.

This is a fraud and deceit action to recover actual and punitive damages, brought by Leon Warr, the vendor of certain real property, and the respondent herein, against Carolina Power and Light Company, as principal, and J. H. Ryan, as its agent, the appellants herein.

The complaint of the respondent alleges that he was the owner of a tract of land in Chesterfield County, South Carolina, containing 115½ acres, and that J. H. Ryan, an agent of Carolina Power and Light Company, approached the respondent prior to November 11, 1957 and represented to the respondent that one F. B. Creech desired to purchase the said tract of land, and that "the only use and only purpose of buying the land was for planting trees, and that he was only allowed to pay from Twenty-five Dollars to Sixty Dollars an acre; that said agent falsely assured Leon Warr that they were only paying Sixty Dollars an acre for good, cleared land to plant trees on, when in fact they had made purchases in excess of Forty-two Dollars an acre and had paid as much as Two Hundred Dollars an acre for property

adjoining or near the property described above." It is further alleged that the said agent knew that the representations made by him were false and were made with the intent of having the respondent rely thereon; it is then alleged that the respondent relied upon the false and fraudulent representations so made and did, on November 11, 1957, convey to F. B. Creech, for a consideration of \$5,000.00, the said tract of land. It is further alleged that F. B. Creech was actually an agent for Carolina Power and Light Company, and that the said property was being purchased for the purpose of creating a lake in connection with the erection of a steam plant by Carolina Power and Light Company. It is also alleged that the consideration of \$5,000.00 paid for said tract of land was between \$18,000.00 and \$28,000.00 less than the defendant company had paid prior to said time and has paid since for similar type land on a per acre basis. The respondent also alleges that he would not have executed and delivered the said deed if he had known that the property was to be used for a lake site rather than for a tree farm. He asserts that the appellants made false statements as to the intended use of said land, upon which he relied, and that by reason of the fraud and deceit practiced upon him, he has sustained injury and damage. The gravamen of the respondent's complaint is that he was deceived by the appellants' concealment of the truth and the false representation as to the intended use to be made of the tract of land. He alleges that the false statement was that the tract of land was to be used to create a tree farm and that he sold the land at a price which was "less than the defendant company has paid * * * for similar type land on a per acre basis."

The appellants made a motion to strike certain allegations of the complaint as being irrelevant and redundant. They also demurred to the complaint upon the grounds that the complaint does not state facts sufficient to constitute a cause of action, in that: (a) The representations alleged to have been falsely made to and relied on by the respondent are not

such as in law give rise to a cause of action for fraud and deceit; (b) That no statement of fact is alleged which wrongfully influenced the respondent to sell and convey his land; (c) That no statement of fact is alleged which would justify the respondent's reliance on statements allegedly made; and (d) No facts are alleged which show any damage suffered by the respondent as a result of any fraud and deceit practiced upon him.

The Honorable J. Woodrow Lewis, Resident Judge of the Fourth Circuit, denied the motion to strike and overruled the demurrer interposed by the appellants. The case is before this Court pursuant to timely notice of intention to appeal, and the exceptions raise the same questions as were before the Circuit Court. In view of the conclusion we hereinafter reach, it becomes unnecessary for us to determine whether there was error on the part of the lower Court in refusing to strike certain allegations of the complaint. The question for determination is whether there was error on the part of the trial Judge in overruling the demurrer.

We should point out that this is not an action for rescission of the deed made by the respondent but is an action at law for damages sustained by reason of the fraud and deceit alleged to have been practiced upon him by the appellants. We have held that a defrauded party to a contract may tender back the consideration received by him and sue for a rescission of the contract, or retain the consideration and sue for damages. *Bank of Johnston v. Jones et al.*, 141 S. C. 98, 139 S. E. 190; *Turner v. Carey*, 227 S. C. 298, 87 S. E. (2d) 871. In this case the respondent has elected to affirm the deed, retain the consideration received for the sale of the land, and has brought this action at law for fraud and deceit against the vendee to recover damages alleged to have been sustained by reason of the fraud and deceit practiced upon him by the appellants.

When there is a demurrer to a complaint, we must

1 be guided by the rule set forth in *Roper et al. v. South Carolina Tax Commission et al.*, 231 S. C. 587, 99 S. E. (2d) 377, 378, where we said:

"It is elementary that in passing upon a demurrer, the Court is limited to a consideration of the pleadings under attack, all of the factual allegations whereof that are properly pleaded are for the purpose of such consideration deemed admitted. *Spell v. Traxler*, 229 S. C. 466, 93 S. E. (2d) 601. If a complaint states any cause of action, a demurrer should not be sustained. *Fleming v. Pioneer Life Ins. Co.*, 178 S. C. 226, 182 S. E. 154. It has also been held that when a fact is pleaded, whatever inferences of law or conclusions of fact may properly arise from it, are to be regarded as embraced in such averment. *Bryant v. Smith*, 187 S. C. 453, 198 S. E. 20."

However, the filing of a demurrer by the appellants 2, 3 does not admit that they were guilty of fraud and deceit because this allegation constitutes nothing more than a conclusion of the pleader, which is not admitted by the demurrer. A demurrer admits the facts well pleaded in the complaint but does not admit the inferences drawn by the plaintiff from such facts, and it is for the Court to determine as to whether or not such inferences are justifiable. *Alderman v. Bivin*, 233 S. C. 545, 106 S. E. (2d) 385.

In this action for fraud and deceit, the respondent, 4 in order to state a good cause of action, must allege (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted upon by the person; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury. *Jones v. Cooper*, 234 S. C. 477, 109 S. E. (2d) 5; *Mishoe v. General Motors Acceptance Corporation*, 234 S. C. 182, 107 S. E. (2d) 43; *Outlaw v. Calhoun Life Ins. Co.*, S. C. 113 S. E. (2d) 817. It is essential that the facts and circumstances which constitute the fraud should be set out clearly. *Bookhart et al. v. Central Electric Co-op., Inc.*, 222 S. C. 289, 72 S. E. (2d) 576. The complaint must allege facts which would afford a basis upon which a jury could properly find support for each of

the elements above set forth, and if the complaint fails to allege facts to support any one of the elements of fraud and deceit, then the complaint is fatally defective. *Jones v. Cooper, supra*, and *Able v. Equitable Life Assur. Society of United States*, 186 S. C. 381, 195 S. E. 652.

It is the position of the appellants that even though the alleged statement made by J. H. Ryan to the respondent was false, as to the intended use of the land being purchased, such was not material in inducing the respondent to sell and convey the land in question. It is also asserted that the complaint fails to allege any facts as to injury or damage sustained by the respondent as a result of the alleged false representation made by the appellants.

The allegations of the complaint do not show that any fiduciary relationship existed between the respondent and the appellants, or that the respondent expressly reposed any trust or confidence in Ryan, who was purchasing the land for his corporate principal. Our inquiry here is as to the materiality of the alleged false statement that the tract of land being sold was going to be used as a place for planting trees and as a tree farm, and the failure to disclose that the land was to be used as a lake site by the Carolina Power and Light Company.

It has been held that if either party to a transaction

5 conceals some fact which is material, which is within his own knowledge, and which it is his duty to disclose, he is guilty of fraud. Nondisclosure becomes fraudulent only when it is the duty of the party having knowledge of the facts to uncover them to the other. In the case of *Holly Hill Lumber Co., Inc., v. McCoy*, 201 S. C. 427, 23 S. E. (2d) 372, 376, this Court said:

“And this brings up the question, when does such duty rest upon either party to any transaction? The duty to disclose may be reduced to three distinct classes: First, where it arises from a pre-existing definite fiduciary relation between the parties; second, where one party expressly re-

poses a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied. The third class includes those instances where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary, and necessarily calls for perfect good faith and full disclosure, without regard to any particular intention of the parties. Such, for instance, as a contract of insurance. Pom. Eq. Jur., Vol. 2, Sec. 902; Pom Eq. Rem., Vol. 2, Sec. 784.

"As instances of concealment appear most frequently in contracts of sale, it would be proper to apply the foregoing general doctrine to the vendee and the vendor. The conclusion is clearly established by the decisions that under ordinary circumstances, there being no previously existing fiduciary relation between the parties, and no confidence being expressly reposed by the vendor in the vendee with reference to the particular transaction, no duty rests upon the vendee to disclose facts which he may happen to know advantageous to the vendor, facts concerning the thing to be sold which would enhance its value or tend to cause the vendor to demand a higher price, and the like; so that failure to disclose would not be a fraudulent concealment. The reason is evident. If it were otherwise, such a principle must extend to every case in which the buyer of an estate happened to have a clearer discernment of its real value than the seller. It is, therefore not only necessary that great advantage should be taken in such a contract, and that such advantage should arise from superiority of skill or information; but it is also necessary to show some obligation binding the party to make such a disclosure. Of course, each case must depend upon its own circumstances."

In 55 Am. Jur., Vendor and Purchaser, Section 95, at page 571, it is stated:

"A misstatement or misrepresentation made in the negotiations for the purchase of land as to the use which the

purchaser intends to make of the land or the purpose for which he wants it does not necessarily constitute fraud, especially where the use for a different purpose from that stated does not injuriously affect the vendor by reason of his ownership of other land in the vicinity. A false statement or representation relating to the purpose for which the purchaser is buying the land or to the use which he intends to make of it is of no consequence unless it appears that the statement or representation made was material, and that the vendor relied upon it and was induced to enter into the contract thereby.

“Some courts, following the minority rule that fraud may not be predicated upon an unfulfilled promise even though at the time it was made the promisor had no intention of performing it, hold that even though the vendee makes false statements regarding his intended use of the property, with intent to deceive the vendor, there is no basis for an action for deceit. Many courts, however, take the position that fraud entitling the vendor to rescind may be found from the facts that the purchaser induced the vendor to sell by falsely representing the use for which he desired the land, knowing that the sale would not be made if the vendor was aware of the purpose or use for which the purchaser wanted the land, particularly where such use of the land will injure the value of other land in the vicinity. To falsely represent that property is desired for private residence purposes when the purchaser intends to use it for business purposes or to convey it immediately to one intending to make such use of it, known to be objectionable to the vendor, is a ground for rescission. This has been held true where the purchaser in negotiating for land in a residential section falsely stated that he wanted it to build dwelling houses thereon, whereas he intended to use it for a public garage, which use would greatly depreciate the value of other land of the vendor.” In this connection see the annotations in 51 A. L. R. at page 104, and 91 A. L. R. at page 1303.”

It would seem clear, under the general principles before referred to, that in order to give rise to a cause of action for fraud and deceit the misrepresentation by the purchaser as to the purpose for which he is buying the land must have been a material one. In *Adams v. Gillig*, 199 N. Y. 314, 92 N. E. 670, 32 L. R. A., N. S., 127, 20 Ann. Cas. 910, where the purchaser, having falsely represented to the vendor that he intended to erect dwellings on the lot to be purchased by him, proceeded upon consummation of its purchase to build thereon a public garage, thereby greatly depreciating the value of the vendor's remaining property, the representation was held to have been fraudulent, entitling the vendor to rescind. And in *Williams v. Kerr*, 152 Pa. 560, 25 A. 618, rescission was permitted where the purchaser's agent had falsely represented to the vendor, as inducement to sale of part of his land, that the portion to be purchased would be used as the site of a foundry and machine shop to be immediately erected on it, which would greatly enhance the value of the vendor's remaining land. But in *Lucas v. Long*, 125 Md. 420, 94 A. 12, where the charge of fraud was based upon the purchaser's false representation that the land was to be used for a dairy farm, and on his concealment of the fact that improvements and developments were pending in that vicinity which would greatly enhance the value of the land, the misrepresentation was held not such as would prevent enforcement of the contract against the vendor, the ground of the decision being that the vendor had not relied upon it and that it was immaterial.

Obviously, whether a misrepresentation as to the intended use of the property will give rise either to a cause of action for rescission or to one for fraud and deceit must depend upon the materiality of the representation in the circumstances of the particular case; and, where the action is for fraud and deceit, the plaintiff must allege and prove, along with the other elements of such a cause of action, that he has suffered damage because of such misrepresentation.

It may be doubted that the complaint in the case at 6, 7 bar alleges facts sufficient to charge that the misrepresentation was a material one. It is alleged, to be sure, that the plaintiff would not have executed the deed had he known the real purpose for which the property was being bought. But, taken in context, that is saying no more than that he would have held out for more money if he had known that the land was wanted by Carolina Power & Light Company. In that view of it, the charge would be grounded on concealment rather than misrepresentation, and the action would fall because the agent, who stood in no fiduciary relation to the plaintiff, was under no duty to disclose to him the intended use.

But we need not decide here whether or not the facts alleged show the misrepresentation to have been a material one; for materiality of the misrepresentation is but one of several elements necessary to be established in order that an action for fraud and deceit may be maintained, and the complaint is wholly lacking in factual allegations of one of the other essentials of such a cause of action, to wit: that plaintiff suffered damage as the result of the alleged misrepresentation. It does not allege that the use of the land by the purchaser for a tree farm would have been of any benefit to the plaintiff, nor is it alleged that the failure to use the land for such purpose has damaged him. It is not alleged that the use of the land in connection with the construction and operation of a steam plant has been of any detriment to him; he does not allege that the sale of the land was for less than its full value. Stating it another way, there is an absence of allegations in the complaint of any benefit that the plaintiff would have derived from the intended use to be made of his land as represented, or of any detriment to him from the actual use made of it. There is no allegation that he sold the land at a reduced price because of the representation that it would be used for a tree farm. It is alleged that the consideration paid "was between \$18,000.00 and \$28,000.00 less than the defendant company has paid prior to said

time and has paid since for similar type land on a per acre basis", but there is no allegation that the plaintiff received less than the full market value for his land. In fact, the complaint does not allege the value of the land, or that the value of plaintiff's remaining land would have been enhanced if the part sold had been used as a tree farm, or has been adversely affected by the use of the part sold as a lake site.

In order to be actionable, fraud and deceit must be accompanied by consequent and proximate injury and damage. If no injury and damage resulted from the fraud and deceit, such is not actionable.

In the case of *Williams v. Haverty Furniture Company*, 182 S. C. 100, 188 S. E. 512, 513, this Court said: "The doctrine announced in an early English case still holds true, that 'fraud without damage or damage without fraud is not actionable.' *Baily v. Merrell*, 3 Bulst., 94, 26 C. J., 1064." A vendor is not damaged by fraud in procuring the sale if the property is worth no more than he receives for it. 23 Am. Jur., Fraud and Deceit, Section 178 at page 997.

In an action for fraud and deceit in the transfer of property, the measure of damage is the difference between the actual and represented value. *Beasley v. Swinton*, 46 S. C. 426, 24 S. E. 313; *Godfrey v. E. P. Burton Lumber Company*, 88 S. C. 132, 70 S. E. 396. In *Culbreath v. Investors Syndicate et al.*, 203 S. C. 213, 26 S. E. (2d) 809, 147 A. L. R. 1144, it was held that the measure of damage with reference to stock is the difference between the value of the stock and the value it was represented to have, or the difference between the contract price and the actual value.

In the complaint in this action there is no allegation of fact as to injury or damage sustained by the respondent as the result of the fraud and deceit practiced by the appellants, other than the pleader's conclusion "that by reason of the fraud and deceit practiced upon Leon Warr by the defend-

ants, as aforesaid, plaintiff has been damaged * * *.” There is an allegation that the respondent received \$5,000.00 as the purchase price for his land, or approximately \$43.00 per acre, but there is no allegation that he received less than the true and full market value thereof. He does allege that the consideration paid to him “was between Eighteen Thousand Dollars and Twenty-Eight Thousand Dollars less than the defendant Company has paid prior to said time and has paid since for similar type land on a per acre basis”. There is no allegation that the land of the respondent was worth more than, or as much as, other land for which he alleges that the corporate appellant paid as much as \$200.00 an acre. It was necessary for the complaint to contain an appropriate allegation as to the actual value of the land as contended for by the respondent. Since the complaint contained no appropriate allegation alleging what damage was suffered by the respondent as a result of the alleged fraud and deceit of the appellants, it was fatally defective.

We think the Circuit Judge was in error in failing to sustain the demurrer of the appellants on the ground that the complaint failed to allege or show any damage suffered by the respondent as a result of any fraud and deceit practiced upon him.

Reversed.

STUKES, C. J. and TAYLOR, OXNER and LEGGE, JJ., concur.

17698

**Willis SANDERS, Respondent, v. ALLIS CHALMERS
MANUFACTURING COMPANY, Appellant**
(115 S. E. (2d) 793)

Action against manufacturer for breach of an alleged oral warranty made by farm implement dealer to buyer of crop harvester. From a judgment of Common Pleas Court, Barnwell County, J. Henry Johnson, J., for buyer, manufacturer

appealed. The Supreme Court, Taylor, J., held that where manufacturer's warranty, printed on purchase order which buyer had signed, expressly disclaimed any warranties in connection with the sale of farm implement other than the express warranty to replace defective parts within one year, such warranty ran to the ultimate buyer from the manufacturer so that the alleged oral warranty made to buyer by dealer was superseded by the written contract and evidence of such oral warranty was inadmissible for the purpose of varying contract terms.

Reversed.

1. EVIDENCE.—When a written warranty exists, evidence of an express parol warranty, varying from it, is not admissible.
2. EVIDENCE.—Where parties reduce an agreement to writing, it is to be presumed that the sole agreement of the parties and the extent of the undertaking was included therein, and parol evidence cannot be introduced to contradict it.
3. SALES.—Where buyer of farm implement affixed his signature to purchase contract upon which was printed, immediately above signature of buyer, a manufacturer's warranty, buyer was charged, in the absence of an allegation of fraud, with the responsibility of having read the warranty before affixing his signature.
4. EVIDENCE—SALES.—Where buyer purchased farm implement from authorized local dealer and where manufacturer's warranty, printed on purchase order, expressly disclaimed any warranty in connection with the sale of farm implement other than warranty to replace defective parts within one year, such warranty ran to ultimate buyer from manufacturer so that alleged oral warranty, made to buyer by dealer, was superseded by the written contract warranty and evidence of such oral warranty was inadmissible for the purpose of varying contract terms.

Messrs. McKay, McKay, Black & Walker, of Columbia, with *John H. Schlosser, Esq.*, of Milwaukee, Wis., of Counsel, for Appellant, cite: *As to the express warranty given by Appellant, embodied in Respondent's signed agreement, precluding recovery upon the oral warranty asserted by him:* 129 S. C. 226, 123 S. E. 845; 136 S. C. 496, 134 S. E. 505; 1 McCord (12 S. C. L.) 220; 1 Strob. (32 S. C. L.) 174; 102 S. C. 130, 86 S. E. 489; 158 S. C. 112, 155

S. E. 268; 117 S. C. 391, 109 S. E. 106; 231 S. C. 1, 97 S. E. (2d) 199; 82 Ga. App. 779, 62 S. E. (2d) 198; 164 N. Y. S. (2d) 249. *As to respondent's failure to read his contract not absolving him from the effect of its provisions:* 234 S. C. 491, 109 S. E. (2d) 5; 129 S. C. 226, 123 S. E. 845.

Messrs. Blatt & Fales, of Barnwell, for Respondent, cite: As to where a manufacturer makes a warranty, oral or written, to an ultimate purchaser or consumer of its products, such warranty is binding on the manufacturer: 231 S. C. 1, 97 S. E. (2d) 199; 227 S. C. 280, 87 S. E. (2d) 822; 140 S. C. 105, 133 S. E. 437; 154 S. C. 424, 151 S. E. 788. *As to rule that in order for a purchaser to be bound by a limited warranty, in so far as it affects the liability of a manufacturer or any seller, the party relying on such limited warranty must prove that this limitation was brought to the attention of the purchaser when the sale was made:* 176 S. C. 345, 180 S. E. 197; 213 S. C. 84, 48 S. E. (2d) 653; 224 S. C. 105, 77 S. E. (2d) 583; 230 S. C. 320, 95 S. E. (2d) 601. *As to misrepresentations as to the contents and effect of a contract, whereby a person is induced to sign a contract without reading it, being an element of fraud:* 85 S. C. 128, 67 S. E. 149; 167 S. C. 345, 166 S. E. 346; 140 S. C. 105, 133 S. E. 437; 136 S. C. 496, 134 S. E. 505.

August 15, 1960.

TAYLOR, Justice.

This case has been before this Court previously, see *Sanders v. Allis Chalmers Manufacturing Company*, 235 S. C. 259, 111 S. E. (2d) 201.

Plaintiff purchased from one of defendant's dealers in Barnwell County a combine and other equipment which he alleges in his complaint was incapable of performing as represented to him by one Frank E. Lee, an authorized representative and employee of Defendant. Defendant's answer denies the making of the alleged oral warranty and alleges

that a deficiency in the operation of the combine was caused or contributed to by a Ro-Master attachment for which defendant was in nowise responsible, having neither manufactured nor sold same; that there was no privity of contract between plaintiff and defendant; that plaintiff purchased the equipment from the local dealer, agreeing in writing on the nature and extent of the sole warranty made with respect to the equipment manufactured by defendant. The usual motions for directed verdict and judgment *non obstante veredicto* were made and denied, and the case was submitted to the jury who found for plaintiff. Defendant now appeals, contending principally that the written warranty superseded the parol warranty if such in fact was made at the time of the sale and purchase.

The equipment in question was purchased from Molair Farm Equipment, defendant's dealer in Barnwell, South Carolina; and it is described in the purchase order as "SP 100 All Crop Harvester; Reel, Cycle, and Retractable Finger Auger," the total purchase price being \$4,862.00. On the same page and below the listing appears the word "Warranty" in large letters; then in usual type, the following appears:

"It is understood that the Allis-Chalmers machinery is sold by the Dealer with the standard warranty of the manufacturer, set forth in full on the reverse side hereof. This warranty is the only warranty either express, implied, or statutory, upon which said machinery is sold."

And at the top of the page on the reverse side again appears the word "Warranty" in large letters, under which appears the following:

"It is understood that the Allis-Chalmers machinery is sold by the Dealer with the following standard warranty of the Manufacturer, And No Other:

"Allis-Chalmers Manufacturing Company warrants that it will repair f. o. b. its factory, or furnish without charge f. o. b its factory, a similar part to replace any material in

its machinery which within one year (six months as to crawler-type tractors and motor patrols) after the date of sale by the Dealer is proved to the satisfaction of the Company to have been defective at the time it was sold, provided that all parts claimed defective shall be returned, properly identified, to the Company's branch house having jurisdiction over the Dealer's territory, charges prepaid.

"This warranty to repair applies only to new and unused machinery, which, after shipment from the factory of the Company, has not been altered, changed, repaired or treated in any manner whatsoever, and does not extend to trade accessories, attachments, tools, or implements not manufactured by the Company, though sold or operated with the Company's machinery.

"This Warranty to Repair Is the Only Warranty Either Express, Implied, or Statutory, upon Which Said Machinery is sold; the Company's liability in connection with this transaction is expressly limited to the repair or replacement of defective parts, all other damages and warranties, statutory or otherwise, being hereby expressly waived by the Purchaser.

"No representative of the Company has authority to change this warranty or this contract in any manner whatsoever, and no attempt to repair or promise to repair or improve the machinery covered by this contract by any representative of the Company shall waive any consideration of the contract or change or extend this warranty in any manner whatsoever."

Plaintiff does not base his action upon the written warranty but upon the alleged oral warranty made by Mr. Lee, contending that the written warranty runs to the dealer and not to the purchaser. A reading of the warranty reveals that the machinery is sold by the dealer with such warranty by the manufacturer. It, briefly, provides for repair or replacement of defective parts within a year from date of such sale; further, that "no attempt to repair or promise to repair or

improve the machinery covered by this contract by any representative of the Company shall waive any consideration of the contract or change or extend this warranty in any manner whatsoever." This would indicate that the warranty is to run to the purchaser through the dealer.

When a contract is reduced to writing, the parties are 1, 2 never presumed to have undertaken anything more than is contained in the writing itself. An express warranty, therefore, of any particular thing or quality, would seem to exclude the idea of any other. And when a written warranty exists, an express parol warranty, varying from it, ought not to be admitted. *Smith v. McCall*, 1 McCord (12 S. C. L.) 220. Where parties reduce an agreement to writing, it is to be presumed that the sole agreement of the parties and the extent of the undertaking was included therein, and parol evidence cannot be introduced to contradict it. *Wood v. Ashe*, 1 Strob. (32 S. C. L.) 407; *Smith & Fur-bush Machine Co. v. Johnston*, 102 S. C. 130, 86 S. E. 489.

In *Spartanburg Hotel Corporation v. Alexander Smith, Incorporated*, 231 S. C. 1, 97 S. E. (2d) 199, plaintiff purchased carpeting from the manufacturer, which carpeting was delivered through a local dealer. Prior to the time of sale, an agent of the manufacturer made an express oral warranty to the effect that the carpeting would not fade. An action was brought against the manufacturer for breach of such express oral warranty. This Court in its Opinion quoted from *Studebaker Corp. v. Nail*, 82 Ga. App. 779, 62 S. E. (2d) 198, 201, as follows:

" * * * It is true that a warranty of personalty does not run with the article warranted. But a manufacturer may warrant his products to ultimate purchasers * * *. The consideration for such a warranty would be the purchase by the ultimate purchaser of the manufacturer's product, which is in effect a direct purchase as it would have been if the purchaser had bought from an agent of the manufacturer instead of an independent dealer or contractor. * * * There is

no obstacle preventing a manufacturer from making a contract with an ultimate consumer to guarantee an article sold to the latter, directly or indirectly, if the elements of intention to contract and consideration are present, as they are in this case. * * *

An examination of *Studebaker Corp. v. Nail*, *supra*, reveals that an express written warranty between the manufacturer became a contract with the ultimate purchaser even though the purchaser dealt only with the dealer. In *Spartanburg Hotel Corporation v. Alexander Smith, Incorporated*, *supra*, the transaction was between the manufacturer and the purchaser but the principles laid down in the *Georgia case* were recognized. See also *Tharp v. Allis-Chalmers Manufacturing Company*, 42 N. M. 443, 81 P. (2d) 703, 117 A. L. R. 1344; and *Allis-Chalmers Manufacturing Company v. Hawhee*, Okl., 105 P. (2d) 410.

Plaintiff takes the position that he is not bound by the warranty as expressed in the sales contract because he signed the order in blank without reading it. In *J. B. Colt Company v. Britt*, 129 S. C. 226, 123 S. E. 845, 847, we find the language of the Court as follows:

“* * * One is that no person should be permitted to found an enforceable right upon fraud; the other is that the public interests require that commercial transactions be safeguarded, negligence discouraged, and the opportunity for and temptation to perjury minimized, by attaching to a written contract a certain conclusive force or artificial sanctity as the memorial of the transaction it purports to evidence. As an outgrowth of the latter policy, we have the two familiar general rules: (1) That a written contract cannot be varied by parol or extrinsic evidence, and (2) that one cannot avoid a written contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form. 13 C. J. 370, § 249. The latter rule obviously rests upon the basic premise that it

is a duty owed by every contracting party to the other party and to the public to learn and know the contents of a written contract before he signs and delivers it. * * *"

In this case there is no allegation of fraud. The contract in question contains a warranty clause on the front page immediately above the signature of plaintiff in the same type as that employed generally throughout the contract. Plaintiff could have and is charged with the responsibility of having read same before affixing his signature thereto. The liability of the manufacturer under the express terms of the limited warranty could not be extended by Mr. Lee or the dealer beyond those of the agreement. Any other warranty is expressly excluded.

We are of opinion that the warranty runs to the purchaser; that oral representations, if any, which may have been made at the time of sale were superseded by the contract in writing and, therefore, inadmissible for the purpose of varying the terms of the written agreement; that the verdict and judgment appealed from should be set aside and judgment entered for defendant; and It Is So Ordered. Reversed.

STUKES, C. J., and OXNER, LEGGE and MOSS, JJ., concur.

17699

Lillie HAMILTON, Appellant, v. PALMETTO PROPERTIES, INC.,
Respondent
(116 S. E. (2d) 12)

Action by landlord to reform lease. The Common Pleas Court, Dillon County, J. Woodrow Lewis, J., rendered judgment for tenant, and landlord appealed. The Supreme Court, Legge, J., held that where landlord was advised by counsel that written lease was for ten years with option to renew, and she thereafter accepted checks from tenant in prepay-

ment of first five years' rent, landlord was estopped from claiming that lease was for only five years.

Affirmed.

1. REFORMATION OF INSTRUMENTS.—In action by landlord for reformation of lease, evidence sustained finding that landlord was not overreached, was in possession of her faculties, and knew what she was doing when she executed the lease.
2. REFERENCE.—It was particularly within province of master to pass upon credibility of witnesses whom he saw and heard.
3. APPEAL AND ERROR.—Master's findings, which were neither lacking in evidentiary support nor contrary to clear preponderance of evidence and were concurred in by circuit judge, were conclusive on appeal.
4. ESTOPPEL.—Where landlboard was advised by counsel that written lease was for ten years with option to renew, and she thereafter accepted checks from tenant in prepayment of first five years' rent, landlord was estopped from claiming that lease was for only five years.
5. CONTRACTS.—In all cases were conduct of party, who claims that his capacity to contract had been destroyed by too free use of ardent spirits, is such as to have appearance of his having confirmed the contract, defense of incapacity to contract should not be allowed.
6. CONTRACTS.—Where a party whose capacity to contract has been destroyed by too free use of ardent spirits does not intend to be bound by the contract he signs, he should go the instant he is restored to his senses and return all that he has received as consideration.

J. Milton McDonald, Esq., of Dillon, for Appellant, cites: As to right of party to contract, executed while intoxicated, to relief from consequences of acts performed while in such condition: 4 Rich. 136. As to the Master in Equity, in a case of this type, being the judge of the credibility of the witnesses, but that judgment must not be exercised arbitrarily: 2 Strob. Eq. 157. As to acts and circumstances that will point to a fraudulent design: 37 C. J. S. 439; 18 S. E. (2d) 605, 199 S. C. 100; 185 S. C. 77, 194 S. E. 636; 37 C. J. S. 437. As to acceptance by a party of a sum to which, in any view of the dispute, he was entitled, not waiving his right to reformation of the contract: 76 C. J. S. 379-380, Reformation of Instruments, Sec. 32.

Messrs. Willcox, Hardee, Houck & Palmer, of Florence, for Respondent, cite: As to rule that, in an equity case, where the findings of fact by a Master are concurred in by the Circuit Judge, such findings of fact are conclusive upon the Supreme Court, and will not be disturbed unless it is shown that such findings are without any evidence to support them, or are against the clear preponderance of the evidence: 232 S. C. 582, 103 S. E. (2d) 48; 230 S. C. 299, 95 S. E. (2d) 493; 229 S. C. 430, 93 S. E. (2d) 206; 231 S. C. 14, 97 S. E. (2d) 88. As to rule in regard to the showing that must be made to support reformation of an instrument: 21 S. C. 226; 232 S. C. 116, 101 S. E. (2d) 187; 45 Am. Jur., Secs, 5, 116, 117.

August 16, 1960.

LEGGE, Justice.

By this action, commenced on January 2, 1959, plaintiff sought reformation of a written instrument executed by her on August 27, 1957, whereby she leased to the defendant certain farm land in Dillon County for a term of ten years beginning December 1, 1957, with option to the lessee to extend the term for an additional ten years. The gist of her complaint is that the written lease does not truly reflect the agreement between the parties, which was that its term should be five years, commencing at the end of the 1957 crop year; and that when she executed the lease she was too drunk to read or understand it. In its answer the defendant denied these allegations and pleaded estoppel. The Master found the evidence insufficient to establish that the plaintiff was drunk when she signed the lease or that any undue advantage of her had been taken; he found that by her conduct after the execution of the lease she had estopped herself to question it; and he recommended that the complaint be dismissed. His report was in all respects confirmed by decree of the Honorable J. Woodrow Lewis, Judge of the Fourth Judicial Circuit, dated August 28, 1959; and from that decree the plaintiff has appealed.

By numerous exceptions appellant charges that the 1-3 Circuit Judge erred in confirming the Master's findings that she had not been overreached and that she was in possession of her faculties and knew what she was doing when she executed the lease. These issues in the trial court were essentially factual; and the testimony relating to events prior to and at the time of the execution of the lease, including the question whether or not the appellant was drunk when she signed it, was conflicting. Detailed discussion of it would serve no useful purpose; we have carefully considered all of it, and in our opinion it fully sustains the Master's findings. To pass upon the credibility of the witnesses, whom he saw and heard, was a matter peculiarly within his province. Being neither lacking in evidentiary support nor contrary to the clear preponderance of the evidence, his findings, concurred in by the Circuit Judge, are conclusive under the long-settled rule. *Meyerson v. Malinow*, 231 S. C. 14, 97 S. E. (2d) 88, 65 A. L. R. (2d) 194; *Lisenby v. Newsom*, 234 S. C. 237, 107 S. E. (2d) 449; *Singleton v. Mullins Lumber Co.*, 234 S. C. 330, 108 S. E. (2d) 414.

On the issue of estoppel, it appears from the testi- 4-6 mony of the plaintiff herself that within a month after the lease had been signed she took her counterpart of it to a lawyer, who told her that its term was ten years plus an additional ten years if the lessee should so desire; and that with this knowledge she accepted and used the lessee's weekly checks in prepayment of the rent for the first five years pursuant to an agreement between them supplemental to the lease, and continued to accept and use such checks, seventy-nine in all, until December 31, 1958, when approximately the amount of the rent for five years had been thus paid; whereupon she instituted this action. She contends that this conduct on her part was consistent with her claim that the lease was for only five years; but that contention overlooks the fact that she had been advised by counsel, and admittedly knew, that it was for ten years.

"It is, perhaps, one of the most difficult questions which can be presented to a jury, to decide how far the capacity to contract has been destroyed by the too free use of ardent spirits. But too ready an ear should not be lent to such a defense; and in all cases where the subsequent conduct of the party making it is such as to have the appearance of his having confirmed the contract, the defense should not be allowed: for even if a man be so much intoxicated as not to know what he is doing, yet he may afterwards confirm the contract by his acts. If he does not intend to be bound by it, he should go the instant he is restored to his senses and return all that he has received as a consideration." *Williams v. Inabnet*, 1830, 1 Bailey (17 S. C. Law) 343.

Affirmed.

STUKES, C. J., and TAYLOR, OXNER and MOSS, JJ.,
concur.

17700

DERBY HEIGHTS, INC., Respondent, v. GANTT WATER AND
SEWER DISTRICT, Appellant, and Eight other
cases against the same appellant
(116 S. E. (2d) 18)

Nine actions by developers of subdivisions and property owner against water and sewer district, which had power of eminent domain, for alleged taking of water lines constructed by developers and property owner at their own expense under streets conveyed to county. The Common Pleas Court, Greenville County, T. B. Greneker, J., rendered judgments for plaintiffs in seven cases and judgments of dismissal in the other two on ground that there had been no taking, and defendant appealed. The Supreme Court, Legge, J., held that where district took over operation of water lines, district had not merely continued use of lines for purpose for which they were constructed but had exercised power of eminent do-

main, and plaintiffs were entitled to recover "just compensation" therefor.

Affirmed.

1. DEDICATION.—"Dedication" is the intentional appropriation of land or of an easement therein for some proper public purpose; it is not a unilateral transaction, and for its completion there must be acceptance by public of property for particular purpose.

See publication Words and Phrases, for other judicial constructions and definitions of "Dedication".

2. DEDICATION.—In absence of express gift, one who asserts a dedication must show conduct on part of landowner clearly, convincingly, and unequivocally indicating intention to create right in public to use land, adversely to landowner, for a particular purpose.
8. DEDICATION.—Conveyance of streets by developers of subdivision and property owner to county did not necessarily preclude developers and owner from laying water pipes below surface of streets, even though deeds might have contained no express reservation of their right to do so, but if developers and owners had no right to construct the lines without county's approval, county, objecting, might have required removal of the lines.
4. DEDICATION.—In action by developers of subdivisions and property owner, who had constructed water lines under streets they had conveyed to county, against water and sewer district which had power of eminent domain for "just compensation" for alleged taking of the lines, evidence supported finding that there had been no dedication of the lines. Act April 21, 1954, 48 Stat. at Large, p. 2215, §§ 1 *et seq.*, 3.
5. EMINENT DOMAIN.—Where there was nothing to show that developers of subdivisions and property owner who had constructed water lines under streets conveyed to county did not own the lines when water and sewer district which had power of eminent domain took lines over as part of its system, fact that when developers fixed prices for the lots they sold they took into consideration cost of lines did not preclude them from recovering just compensation for the taking. Act April 21, 1954, 48 Stat. at Large, p. 2215, §§ 1 *et seq.*, 3; Const. art. 1, § 17.
6. CONSTITUTIONAL LAW.—Constitutional prohibition against taking of private property for public use without just compensation is self-executing. Const. art. 1, § 17.
7. EMINENT DOMAIN.—In actions by developers of subdivisions and property owner, who had constructed water lines under streets they had conveyed to county, against water and sewer district, which had power of eminent domain, for just compensation for alleged

taking of the lines, evidence supported finding that lines had been installed by developers and owner at their own expense, that lines had been incorporated in and made part of water distribution system of district, and that, had such not been done, it would have been necessary for district to construct lines at its own expense. Act April 21, 1954, 48 Stat. at Large, p. 2215, §§ 1 *et seq.*, 3.

8. **EMINENT DOMAIN.**—Where water and sewer district, which had power of eminent domain, took over operation of water lines constructed by developers of subdivisions and property owner at their own expense under streets they had conveyed to county, district had not merely continued use of lines for purpose for which they were constructed but had exercised its power of eminent domain, and developers and owner were entitled to just compensation for such taking. Act April 21, 1954, 48 Stat. at Large, p. 2215, §§ 1 *et seq.*, 3; Const. art. 1, § 17.
9. **WATERS AND WATER COURSES.**—Fact that water lines laid at expense of developers of subdivision and property owner beneath streets they had conveyed to county were not productive of revenue to developers and owner did not cause them to lose ownership of the lines.

Messrs. E. P. Riley, E. P. Riley, Jr., and R. W. Riley, of Greenville, for Appellant, cite: As to what constitutes intent to dedicate in South Carolina: 6 S. C. L. Q. 96. As to an implied intent to dedicate being shown by acts of the owner justifying the public authorities in believing the intention exists, where they act upon such belief, even though the owner may never have actually intended a dedication: (W. Va.) 100 S. E. 394, 7 A. L. R. 717; 222 S. C. 342, 72 S. E. (2d) 699; 165 Va. 425, 182 S. E. 548; 234 N. C. 708, 68 S. E. (2d) 838; 30 Ohio App. 1, 164 N. E. 62; (Tex.) 134 S. W. (2d) 404; 214 Minn. 26, 8 N. W. (2d) 321; 129 F. Supp. 624; 18 Tenn. App. 142, 74 S. W. (2d) 209; (La. App.) 165 So. 471; 235 S. C. 277.

Messrs. Leatherwood, Walker, Todd & Mann, of Greenville, for Respondent, cite: As to where an action at law is tried before a Special Referee, or a Judge, without a jury, the findings of fact have the same force and effect as the verdict of a jury: 232 S. C. 268, 101 S. E. (2d) 664; 234 S. C. 1, 106 S. E. (2d) 447. As to there being a "taking" of Respondent's water lines by Appellant under its right of emi-

ment domain: 194 S. C. 15, 8 S. E. (2d) 871. *As to the evidence not showing that the Plaintiffs-Respondents contributed their water pipes to the subdivisions and in turn to the public, thereby dedicating said water pipes to the public:* 16 Am. Jur. 348; 5 Strob. 217; 57 S. C. 507, 35 S. E. 800; 16 Am. Jur. 377, Dedication, Sec. 31; 16 Am. Jur. 417, Dedication, Sec. 75; 234 S. C. 1, 106 S. E. (2d) 447; 46 Tenn. 310, 98 Am. Dec. 452; 198 N. C. 564, 152 S. E. 686; 201 N. C. 258, 159 S. E. 414; 208 N. C. 309, 180 S. E. 573; 119 N. C. 330, 25 S. E. 958; 169 Va. 376, 193 S. E. 503; 151 Va. 396, 145 S. E. 355; 246 N. C. 404, 98 S. E. (2d) 444; 16 Am. Jur. 359, Dedication, Sec. 15. *As to certain exceptions being too general for consideration:* 228 S. C. 34, 88 S. E. (2d) 838; 230 S. C. 416, 95 S. E. (2d) 854; 231 S. C. 378, 98 S. E. (2d) 803.

Messrs. Wyche, Burgess & Wyche, of Greenville, for Amicus Curiae, being Woodfields, Inc., cite: As to what amounts to a "taking" of private property under the laws of South Carolina: 194 S. C. 15, 8 S. E. (2d) 871; 50 Miss. 601. *As to it not appearing, as a matter of law, that Respondents did at any time "Dedicate" their private water lines to the Appellant, Gantt Water and Sewer District, or to anyone else:* 3 Dillon, Municipal Corporations, Sec. 1079 (5th Ed. 1911); 222 S. C. 342, 72 S. E. (2d) 699; 60 N. Y. S. 1017, 44 App. Div. 574, aff'd. 167 N. Y. 541, 60 N. E. 1123; 182 Ala. 419, 62 So. 712; 198 N. C. 564, 152 S. E. 686; 201 N. C. 258, 159 S. E. 414 (Va.); 193 S. E. 503; (Ariz.) 130 P. (2d) 40; (Okla.) 304 P. (2d) 967; (N. C.) 98 S. E. (2d) 444; 232 S. C. 515, 103 S. E. (2d) 14.

Messrs. E. P. Riley, E. P. Riley, Jr., and R. W. Riley, of Greenville, for Appellant, in Reply.

August 18, 1960.

LEGGE, Justice.

In nine actions, tried together, recovery of "just compensation" was sought against the defendant, Gantt Water &

Sewer District, a public corporation, for its alleged taking of water lines that the plaintiffs had installed to serve their respective properties. In seven of them the Master, finding that there had been a taking, recommended judgment for the plaintiffs with interest from August 1, 1958, the date of their demand for compensation. In two, he found that the plaintiffs' lines had not, at the time of the trial, been taken into the defendant's water distribution system; and as to them he recommended dismissal without prejudice. By order of December 9, 1959, the Honorable T. B. Greneker, Presiding Judge, rejected the Master's recommendation as to allowance of interest, but in all other respects confirmed his report and adopted the recommendations contained therein. From that order the defendant has appealed.

There is no issue here as to the amounts awarded in these cases. Actually, the appeal involves but two questions:

1. Had the respective plaintiffs dedicated their water lines to the public?
2. Was there a taking by the defendant?

By the Act of April 21, 1954 (48 Stat. at L. 2215), there was created a public corporation known as Gantt Water & Sewer District. The area of the district, as described in the Act, comprised a portion of Greenville County lying to the west of the City of Greenville and to the south of the Parker Water and Sewer Sub-District. The Act committed to the district "the functions of constructing, operating, maintaining, improving and extending a Water Distribution System, a sewer system, a system for the collection and disposition of garbage, and a system for fire protection" within its area; established a Commission to operate, manage and govern it; and prescribed its powers, which included that of eminent domain.

With the exception of Suela Hewins, all of the respondents owned and developed residential subdivisions, served by water lines constructed at their own expense under the streets of their respective subdivisions, which streets they

had laid out and conveyed to Greenville County. Water for these lines was obtained from the water system of the City of Greenville. Suela Hewins in 1955 installed at her own expense a private water line from the city's system to her residence in a subdivision known as Terry Court.

The area of Gantt Water & Sewer District included all of the properties before referred to. When Gantt began operation in 1955 it issued bonds and out of their proceeds it constructed certain water mains: but it proceeded to use respondents' lines for the servicing of their subdivisions; it required that all properties within the district use its water supply, which it obtained from the city's water system; and, pursuant to a contract between it and Greenville City Water Works, a surcharge of 331/3% was added to all water bills rendered to customers in the district, this surcharge being collected by the City Water Works for the account of Gantt. A tap fee was required for each consumer unit served, in the amount of \$60.00, of which \$18.00 went to Gantt and \$42.00 (\$35.00 for installation of the meter and \$7.00 for the cost of making the tap) went to the City Water Works.

The testimony negates the idea that respondents either gave the water lines in question to Gantt or consented that it should, without cost, take them over. Appellant, so conceding, contends nevertheless that respondents had no property in them because; (1) by having laid them in streets that had been conveyed to Greenville County, respondents actually or by implication had dedicated them to public use; and (2) since the cost of them had been taken into consideration in fixing the prices of lots in their subdivisions, respondents had already been compensated for such cost by the purchasers of the lots.

Dedication is the intentional appropriation of land,
1, 2 or of an easement therein, for some proper public purpose. 16 Am. Jur., Dedication, Section 2; 26 C. J. S. Dedication § 1. It is not a unilateral transaction; for its completion there must be acceptance by the public, of the prop-

erty, for the particular purpose. In the absence of an express gift, one who asserts a dedication must show conduct on the part of the landowner clearly, convincingly and unequivocally indicating his intention to create right in the public to use the land, adversely to him, for such purpose. *Town of Estill v. Clarke*, 179 S. C. 359, 184 S. E. 89; *Shia v. Pendergrass*, 222 S. C. 342, 72 S. E. (2d) 699.

Construction of the water lines, like the laying out 3, 4 of streets, was an essential part of the development of the subdivisions. Conveyance of the streets to the county did not necessarily preclude respondents from laying water pipes below their surface, even though the deeds may have contained no express reservation of their right to do so. It is not suggested that Greenville County either was ignorant of or objected to such construction. Whether the deeds conveyed the street areas in fee or an easement in them for street purposes is not disclosed by the record before us; and in our view that matter is immaterial. If respondents had no right, without the county's consent, to construct their lines under those areas, the county, objecting, may have required their removal. Cf. *Cloverdale Homes v. Town of Cloverdale*, 182 Ala. 419, 62 So. 712, 47 L. R. A., N. S., 607. But that is beside the point; the issue here is whether their construction under the streets effected, as a matter of law, a dedication of the water lines to the public. There was testimony for the respondents that no gift of these lines was ever made or intended. And that they were recognized by Gantt as privately owned is evidenced by its chairman's letter of September 30, 1955 to Messrs. Huguenin & Douglas, the first paragraph of which reads as follows: "It is our understanding that you are the owner of Belle Meade-Derby Heights, a subdivision located within the area of our water and sewer district. We also understand that you own the private water line now serving your development." The evidence amply warranted the finding, by the two lower tribunals, that there had been no dedication of the water lines in question.

We find no merit in appellant's contention that since
5 respondents, when they fixed the prices of lots in their subdivisions, had taken into consideration the cost of the water lines, they were compensated for such cost by the purchasers and therefore had no property in the water lines for which they could demand that appellant compensate them. The testimony for respondents, though not very specific on this point, warrants the conclusion that they expected, from the sale of lots, to recoup the cost of installing their water systems as well as the other expenses incident to the development of their subdivisions. But there is nothing in that or any other testimony in the record here to require the conclusion that they did not own these lines when appellant took them over as part of its water system. Respondents' ownership of course entailed responsibility toward the owners of lots in their subdivisions, for they were under duty to them to render an adequate supply of water available in the subdivisions; and since that water was delivered through respondents' lines, theirs was the duty to maintain them. But the water pipes were the property of the respondents. If they had taken them up and put down others instead, the lot owners could not have complained so long as an adequate supply of water was rendered available to them. If they had taken them up and not replaced them, respondents would have breached an obligation to their lot owners, but none to appellant. The evidence is convincing that regardless of the fact that the prices of their lots were higher than they would have been if water had not been made available to the purchasers, respondents were the owners of their water lines when they were taken over by the appellant. The amount of "just compensation" to which such ownership entitled them upon a taking for public use is, as we have hereinbefore stated, not in issue.

Appellant argues that in taking over the operation of
6-8 respondents' lines it did not exercise its right of eminent domain; and that all that it has done has been to continue the use of these lines for the purpose for which

they were constructed. This argument is without merit. The constitutional provision (art. I, Sec. 17, Const. of S. C.) is self-executing, *Chick Springs Water Co. v. State Highway Department*, 159 S. C. 481, 157 S. E. 842; *Godwin v. Carri-gan*, 227 S. C. 216, 87 S. E. (2d) 471; *Smith v. City of Greenville*, 229 S. C. 252, 92 S. E. (2d) 639; its protection extends to every essential element of ownership, *Gasque v. Town of Conway*, 194 S. C. 15, 8 S. E. (2d) 871; *Early v. South Carolina Public Service Authority*, 228 S. C. 392, 90 S. E. (2d) 472. The record fully supports the finding by the circuit judge "that the water lines installed by the plaintiffs at their own expense have been incorporated in and made a part of the water distribution system of the defendant and that, had such not been done, it would have been necessary for the defendant to construct these lines at its own expense."

Appellant's contention appears to be that since water lines were essential to the salability of the properties, their installation by respondents was a contribution to the subdivisions and thence to the public generally and to appellant in particular, and that respondents had therefore given up all ownership of such lines. In support of this contention it cites *City of Danville v. Forest Hills Development Corporation*, 165 Va. 425, 182 S. E. 548, and *Spaugh v. City of Winston-Salem*, 234 N. C. 708, 68 S. E. (2d) 838.

In *City of Danville v. Forest Hills Development Corporation*, *supra*, the city having annexed a contiguous subdivision and having taken over its water, gas and sewer mains and electric lines that its developers had installed, the latter sued to recover compensation therefor. The issues were submitted to a jury, which rendered a verdict in favor of the city; the trial court set it aside and rendered judgment for the plaintiff; and the city appealed. The supreme court reversed; pointed out that the Virginia Code permitted proprietors of subdivisions annexed by cities of more than 100,000 inhabitants under certain circumstances to recover from such cities the fair value of certain improvements con-

structed by them, but made no such provision with regard to subdivisions annexed by cities of less than 100,000 inhabitants; and said [165 Va. 425, 182 S. E. 550]:

“It would, therefore, appear to be the legislative policy in this state to prohibit recovery for any improvements made by the owners or proprietors of any subdivision subsequently annexed by a city with less than 100,000 inhabitants; and when the improvements, if any made, are approved by the city, they may not now be removed by such owner or proprietor without the consent of the city, by virtue of section 5222r of the Code.”

The court further said that since Forest Hills had doubtless included the cost of the improvements in the sale price of its lots and since it could not have expected to derive revenue from the gas, water and electricity (which the city furnished to its purchasers), it lost nothing by the city's appropriation of these facilities, being actually relieved of the cost of their future maintenance; and that therefore it could see no reason for permitting the corporation to hold the city for the cost of these improvements under the circumstances. And: “It, moreover, seems plain that when the water mains, pipes, etc., were constructed by the plaintiff as an inducement to the purchase of its lots, the plaintiff thereby dedicated said mains and pipes to the use of the lot owners, and has no right to claim adverse ownership in or remove the same without such lot owners' consent.”

For reasons before mentioned we do not think that
9 the plaintiffs in the case at bar lost ownership of their water pipes because of the fact that their lots brought higher prices on account of the water supply thus rendered available; or that such ownership was lost because it was not productive of revenue; or that the plaintiffs' obligation to render available to the purchasers of their lots a supply of water constituted as a matter of law a dedication of the water pipes here in question. In these particulars our view differs from that expressed in the *Danville case*. The decision in that case appears to have rested primarily upon the

Virginia statute, *cf. Leonard v. Town of Waynesboro, infra*; which distinguishes it from the case at bar. (We note, in passing, that no issue was raised as to the constitutionality of the Virginia statute.) And this further distinction is to be observed, that in the *Danville* case the issue of liability was resolved against the plaintiff by the jury's verdict. As the court said, after discussing the North Carolina case of *Stephens Co. v. City of Charlotte*, 201 N. C. 258, 159 S. E. 414: "If we take that case as authority, it would seem that the question here involved is purely one for the jury and not for the court, and the trial court was, therefore, in error in setting the verdict aside." [165 Va. 425, 182 S. E. 550.] In the case at bar the master found as matters of fact that there had been no sale or gift or dedication, and that the plaintiffs owned their water lines at the time when the defendant appropriated them as part of its water distribution system; and in these findings the circuit court concurred.

In *Leonard v. Town of Waynesboro*, 169 Va. 376, 193 S. E. 503, the plaintiff filed a bill in equity, praying that the court establish the true corporate line of the town to determine whether her property lay within or without its corporate limits and, if it should be determined that it lay within the town, to require it to reimburse her for a water line that she had constructed to enable her to obtain from the town a supply of water. The lower court determined that her property lay within the limits of the town, but by a separate decree declined to allow her to be reimbursed for the water line. The latter holding was reversed on appeal, and the supreme court, distinguishing its earlier decision in *City of Danville v. Forest Hills Development Corporation* as having been governed by the annexation statute, and, referring to *Mount Jackson v. Nelson*, 151 Va. 396, 145 S. E. 355, said [169 Va. 376, 193 S. E. 506]: "The facts in that case were unlike those in the present case, but the principle applied there is applicable here, *vis.*, that where a town takes over and controls a water line built by others and uses it for the benefit of the town and consumers generally, and through

it delivers water for a profit, it is obligated to pay, on a *quantum meruit*, those who constructed the line."

Spaugh v. City of Winston-Salem, supra, is not in point. There the developers of a subdivision adjacent to the city who had, with the city's consent, connected their water system with the city's mains prior to annexation, were held bound by the city ordinance then in force which provided that whenever the city should permit those outside its limits to connect their water and sewer lines with its mains such lines, in the event that the territory in which they were located should be incorporated within the city's limits, should become the property of the city.

In *Abbot Realty Co. v. City of Charlotte*, 198 N. C. 564, 152 S. E. 686, the plaintiff, owning a number of lots fronting on certain streets within the corporate limits of the city, developed them for sale for residential and business purposes. There being at that time no city sewers along and under the streets on which these lots fronted, the president of the plaintiff corporation proposed to the city's commissioner of public works that the city construct them and connect them with its sewerage system; and the commissioner, stating that the city had no funds then available for this purpose, agreed that if the corporation would cause such sewers to be constructed the city would reimburse it soon as it should have available funds in hand. The plaintiff constructed the sewers in reliance upon that agreement, and thereafter the city reimbursed it for part of the cost but refused to pay the balance. Plaintiff then sued for said balance, and was nonsuited. On appeal the supreme court, holding the agreement void, nevertheless reversed the judgment and remanded the case for trial saying:

"It does not follow, however, that plaintiff is not entitled to recover in this action. There was evidence tending to show that after the sewers were constructed and paid for by the plaintiff, defendant took them over and incorporated them into its municipal sewerage system. This evidence should have been submitted to the jury upon an appropriate

issue involving plaintiff's contention that defendant is liable to it upon a *quantum meruit*. Notwithstanding the failure of plaintiff to sustain its contention that defendant is liable to it on the contract alleged in the complaint, the defendant should be and is liable for the reasonable and just value of the sewers, if the defendant took them over and incorporated them into its municipal sewerage system."

We note that the expression "*quantum meruit*" as here used means "the reasonable and just value of the sewers." It suggests, rather than excludes, the idea of "just compensation" in the constitutional sense.

In *Stephens Co. v. City of Charlotte, supra*, the plaintiff had constructed water and sewer lines for its residential suburban development known as Myers Park, outside the corporate limits of the city, and in 1916, with the city's permission, had connected these lines with the city mains. In 1928 the city extended its limit so as to take in Myers Park, and it thereupon took over the said water and sewer system. Plaintiff sued for compensation, and judgment in its favor was affirmed on appeal, the court rejecting, on the authority of *Abbot Realty Co. v. City of Charlotte, supra*, the contention that the plaintiff had nothing of value for the appropriation of which the city could be held liable.

In *Jackson v. City of Gastonia*, 246 N. C. 404, 98 S. E. (2d) 444, owners of certain lands outside the corporate limits of the city had subdivided them and, to increase the salability of the lots, had installed water and sewer lines. The city, exercising no control over or maintenance of said lines, supplied water through the water lines, required meters on the taps, and collected charges from the lot owners for the water used. Later, the area was incorporated into the city, which thereupon took over, used and controlled the said water and sewer lines to the same extent as if it had installed them originally. Action to recover "the reasonable value of water and sewer lines taken by the defendant municipality for a public purpose without compensating the plaintiffs, who had installed, maintained and were the owners of the said

lines prior to the time they were taken over by the defendant", resulted in a judgment of nonsuit, which was reversed on appeal, the court holding that under the facts as stipulated the plaintiffs were entitled to "recover on basis of *quantum meruit* for the reasonable and just value of the water and sewer lines." (Here again "*quantum meruit*" is used in the sense of just compensation, the court's mandate directing that upon remand of the cause "judgment be entered in accordance with the stipulations of the parties as to reasonable value of the lines so taken over, used and controlled.")

The recent case of *Styers v. City of Gastonia*, 252 N. C. 572, 114 S. E. (2d) 348, 350, bears upon the issue before us. There the plaintiffs had constructed water lines outside the city limits, in an area in which they owned no property. These lines, which were connected with the city mains, were constructed at the suggestion of the city's director of utilities, and as an investment from which the plaintiffs would profit by selling to owners of adjacent properties the right to tap on to them and thereby obtain water from the city, which would also benefit by the sale of its water to the plaintiffs' licensees. The city's director of utilities agreed that if and when the city's boundaries should be enlarged to include the lines the plaintiffs would be reimbursed for the amount that they had expended in constructing said lines. In 1955 the city's boundaries were enlarged and, as enlarged, included the plaintiffs' lines. Some time thereafter the city, which through its director of utilities had been requiring a permit from the plaintiffs before making a connection with their lines, proceeded to make such water connections for new customers without obtaining authority from the plaintiffs to do so, and proceeded to take over control of the said lines. Thereafter the plaintiffs demanded compensation, which the city refused; and the plaintiffs brought action to recover it. They did not rest their claim on the agreement before mentioned; they alleged and proved the said agreement for the sole purpose of negating the city's

contention of an offer to dedicate, accepted. Judgment of nonsuit was reversed, the court advertng to the fact that the agreement was void, and that consequently the mere extension of the corporate limits created no liability, and saying: "The liability arose when, and only when, the city appropriated plaintiffs' property to its own use. This appropriation imposed on it a duty to pay the fair value of the property taken." Citing Article I, Section 17 of the North Carolina Constitution; and several North Carolina decisions, among them *Abbot Realty Co. v. City of Charlotte*, *supra*, and *Jackson v. City of Gastonia*, *supra*.

In addition to the cases before mentioned, counsel cite several from other jurisdictions. Brief discussion of them, which follows, reveals that they have little or no persuasive value as to the issues here.

Ford Realty & Construction Co. v. City of Cleveland, 30 Ohio App. 1, 164 N. E. 62, turned on a written contract between the plaintiff and the council of the Village of West Park (that was later taken into the corporate limits of Cleveland), whereby the former agreed to install water mains in its subdivision without expense to the village, and, further, that the village should have the right to utilize these mains as part of its system, and that no action that the village might take should be deemed an appropriation.

South Memphis Land Co. v. City of Memphis, 18 Tenn. App. 142, 74 S. W. (2d) 209, concerned sewer lines installed by the plaintiff in an area later annexed by the city. Prior to the annexation the plaintiff had charged rental for the use of its sewers; after the annexation it voluntarily abandoned all attempts to collect rentals. The city did work on the sewers, repaired them, and removed stoppage, without objection on the part of the plaintiff; it exercised the same regulatory control over them as it did over sewers that it had constructed; it offered to permit plaintiff to make connections and repairs under city supervision; it refused to purchase or pay for the sewers; and it denied intention to

claim them. The action was for conversion, which the court held was not established by these facts.

In *Hightower v. City of Tyler*, Tex. Civ. App. 1939, 134 S. W. (2d) 404, 405, the owners of a suburban development adjacent to the city constructed water and sewer lines, charged the purchasers of the lots with their proportionate part of the cost of such construction, and conveyed to them, along with the lots, title to that part of the water and sewer lines in the street on which they fronted, and which they had dedicated to the public. Before laying these lines, plaintiff had requested the city commission to provide for repayment of the cost of such construction; but this request was declined and the plaintiffs were advised that if their lines were laid out in conformity with the city's specifications they would be permitted to connect them with the city's system at the city limits, but "without any obligation or agreement on the part of the City to ever take over or pay for any such mains or lines." The area was later taken into the city, which continued to supply water through plaintiffs' lines and to charge customers as before, but at a lower rate than had been charged prior to the annexation; and the city refused plaintiffs' demand that it compensate them for the cost of the lines. The court, affirming judgment for the defendant, concluded that since the city had put the lines to no other use than that contemplated by the plaintiffs, who had reserved no interest in or right to use them and who had never requested the city to cease such service, the plaintiffs had given consent to the city to make such use of the lines as was made.

Country Club District Service Co. v. Village of Edina, 214 Minn. 26, 8 N. W. (2d) 321, was an action by a privately owned utility company to recover for services allegedly rendered by it to the village over a period of ten or twelve years through the use of fire hydrants and storm sewers installed within the village by developers of a subdivision, who had later sold the controlling interest in the stock of the plaintiff company. The facts in that case bear little resemblance to those here. But the court, denying recovery, and pointing

out that the developers had represented to the people of the subdivision that the prices they were paying for lots would include a proportionate charge for repayment of the expense of putting in the various improvements, and that they would never be bothered with any assessments for them, quoted with approval from the decision of *City of Danville v. Forest Hills Development Corporation, supra*, to the effect that such conduct constituted a dedication of the utilities to the use of the lot owners.

In *Wilkinson v. City of Shreveport*, La. App. 1936, 165 So. 471, the action was for conversion; and the court, following *South Memphis Land Co. v. City of Memphis, supra*, held the plaintiff's petition against the city for the value of water and sewer lines installed by plaintiff and used by the city after annexation of the area insufficient to allege such a cause of action, the petition not alleging that such use had been protested, but on the contrary intimating that the plaintiff had permitted such use and desired rent therefor.

In *Paar v. City of Prescott*, 1942, 59 Ariz. 497, 130 P. (2d) 40, recovery was allowed, on the theory of unjust enrichment, for the reasonable value of the city's use, within the period of the statutory limitation, of plaintiff's private suburban water system which was connected with the city system, the city having thereby collected substantial revenue from consumers, and there having been no agreement between the parties as to the amount to be paid by the city for such use.

Selected Investments Corporation v. City of Lawton, Okl., 1956, 304 P. (2d) 967, was an action in replevin for water pipes and mains rented by the City of Lawton from the plaintiff for distribution of city water to two city additions. As to the lines in one of these areas, there was a formal lease-purchase agreement between the plaintiff and the city whereby the latter agreed to lease the system at a rental of \$1.00 per month for each home or consumer unit that tapped the system to purchase water from the city, and whereby the

city was also given the option to purchase the system for what it had cost the plaintiff, less amounts paid as rental prior to the date fixed for exercise of the option. As to the lines in the other area, a similar agreement had been entered into, but was not reduced to writing. On the cost of the system in one area the city made a partial payment; the system in the other area was constructed later, and no payment was made by the city on its cost. Plaintiff's demand that the city either complete payment or return the systems was refused, and the action followed, the complaint praying judgment that the city be required to return the systems or, if that could not be done, to pay plaintiff their actual value. Judgment for the defendant was reversed on appeal, two members of the court dissenting for the reason that in their opinion the agreement on the city's part violated certain provisions of Oklahoma's Constitution. The majority opinion rested upon the conclusion that under its agreement with the city the plaintiff had the right to expect the city either to pay for the systems or to relinquish them.

We know of no legislative policy in this state such as that upon which the case of *City of Danville v. Forest Hills Development Co.*, *supra*, was decided. In at least one instance in which a water district was created embracing territory served by privately owned water systems a contrary policy is evident. *Cf. Mills Mill v. Hawkins*, 232 S. C. 515, 519, 103 S. E. (2d) 14, 20, where this court, advertng to the provisions of the 1955 Act, 49 Stat. at L., p. 1400, creating Una Water District in Spartanburg County and empowering it *inter alia* to "purchase, acquire and continue the use and operation of any and all of the water lines and sewer lines that may presently exist in the area," said: "It is fair to assume that under this provision appellants will be compensated for any of their lines which are suitable for use in the plans adopted by the commissioners."

. Affirmed.

STUKES, C. J., and TAYLOR and MOSS, JJ., concur.

OXNER, J., did not participate.

17701

**FRANCIS MARION LIFE INSURANCE COMPANY, Respondent,
v. CITY OF COLUMBIA, South Carolina, and Guy A. Pitts, as
Treasurer of the City of Columbia, South Carolina, Appellants.**

(115 S. E. (2d) 796)

Action to recover money paid under protest as property taxes assessed against certain intangibles owned by plaintiff, plus interest. The Common Pleas Court of Richland County, Legare Bates, J., entered order requiring return of the taxes paid under protest. The defendants appealed. The Supreme Court, Taylor, J., held that where 1932 amendment to Constitution excluded intangible personal property from taxation except such as was especially provided by the General Assembly by the authority and within the limitation of such amendment, and prior to 1932 the Code had included provisions relating to intangible personal property as a part of other taxable property and these provisions were carried forward in the Codes subsequent to the amendment, such recodification was not legislation "especially provided by the General Assembly by the authority and within the limitation" of the 1932 amendment, and consequently intangible personal property was not subject to taxation.

Affirmed.

TAXATION.—Where 1932 amendment to Constitution excluded intangible personal property from taxation except such as was especially provided by the General Assembly by the authority and within the limitation of such amendment, and prior to 1932 the Code had included provisions with respect to taxation of intangible personal property along with other taxable property and those provisions were carried forward in the Codes subsequent to the amendment, such recodification was not legislation "especially provided by General Assembly by authority and within limitation" of the 1932 amendment, and consequently intangible personal property was not subject to taxation. Code 1952, §§ 65-65, 65-1501, 65-1521, 65-1522, 65-1721; Const. art. 10, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Especially Provided by General Assembly by Authority and Within Limitation".

Messrs. John W. Sholenberger, Edward Harter and James M. Windham, of Columbia, for Appellants, cite: As to the Constitution and Statutory Laws of South Carolina permitting imposition of a property tax on intangibles of Respondent: 75 S. C. 560, 56 S. E. 234; 96 S. C. 313, 80 S. E. 599; 103 S. E. (2d) 908, 233 S. C. 129. As to meaning of phrases "total rate of taxation" and "actual value": 51 Am. Jur., Taxation, Sec. 138; Black's Law Dictionary, (4th Ed.); 92 F. (2d) 338.

Messrs. Edens & Hammer, A. Fletcher Spigner, Jr., and Cooper & Gary, of Columbia, for Respondent, cite: As to intangible property of Respondent not being subject to taxation: 227 S. C. 507, 88 S. E. (2d) 591. As to the total rate of taxation imposed exceeding the limitations of Article X, Section 1, of the Constitution: Webster's Dictionary, (2d. Ed.); 165 S. C. 219, 163 S. E. 653; 62 S. C. 28, 39 S. E. 785.

August 22, 1960.

FAYLOR, Justice.

This appeal arises out of an action brought to recover the amount of \$1,043.77 paid under protest as property taxes assessed against certain intangibles owned by plaintiff, plus interest.

The City of Columbia included in plaintiff's assessment certain intangibles as being subject to property taxes. Plaintiff insurance company, pursuant to Section 65-1721 of the Code of Laws of South Carolina, 1952, made its return for the year ending December 31, 1957. Upon receipt of such return, the Tax Commission deducted such items as were exempt by Sec. 65-1522, Code of Laws of South Carolina, 1952, and items assessed locally such as real estate, automobiles, furniture, fixtures and office equipment and equalized and assessed the remainder pursuant to the provisions of Sec. 65-65 of the Code of Laws of South Carolina, 1952. The South Carolina Tax Commission notified plaintiff that a tax assessment in the amount of \$22,740.00 had

been placed on the intangible personal property against the plaintiff insurance company for the year commencing January 1, 1958.

On the basis of this \$22,740.00 valuation of the intangible personal property of plaintiff at a tax levy rate of 45 mills, the City of Columbia levied a tax for the year 1958 against the plaintiff insurance company in the amount of \$1,023.30, which amount was paid under protest and suit duly instituted for recovery. The City of Columbia being in the County of Richland, said County levied a tax for the year 1958 on the same intangible personal property at the rate of 63 mills or a tax total of \$1,446.45.

Plaintiff instituted suit for recovery contending that the intangible personal property on which taxes were paid under protest was not subject to taxation under the Constitution and Laws of South Carolina; and if subject to taxation, the amount paid on such property exceeds the limitations of the Constitution in that it was more than one-half of one per cent.

The Honorable Legare Bates, Judge of the County Court of Richland County, after hearing, issued his Order requiring return of the taxes paid under protest because no legislation has been enacted so providing within the contemplation of Art. X, Sec. 1, of the Constitution of South Carolina, 1895, as amended in 1932, and, further, the tax imposed was in excess of the limitation set forth in said Article and Section of the Constitution.

In 1930, by virtue of Act No. 809 (Acts of the General Assembly, 1930, page 1349) approved April 5, 1930, it was provided that there would be submitted to the electorate an amendment to Art. X, Sec. 1, of the South Carolina Constitution. In 1932, following submission to the electorate, which favored the amendment, there was enacted Act No. 603 (Acts of the General Assembly, 1932, page 1126). The amendment was thus effected. The amendment to Art. X, Sec. 1, as contained in the 1932 Act, was in the following language:

“‘Provided, Further, That the General Assembly may provide by law for the assessment of all intangible personal property, including moneys, credits, bank deposits, corporate stocks, and bonds, at its true value for taxation for State, County and municipal purposes or either thereof: Provided, That the total rate of taxation imposed thereon shall never exceed one-half of one per centum of the actual value of such intangible property: Provided, Further, That such intangible personal property shall not be subject to the three mill levy provided by Section 10, Article 11, of this instrument or to any other general or special tax levy, except such as is especially provided by the General Assembly by the authority and within the limitation of this provision; nor shall such intangible personal property be considered a part of “taxable property,” as such term is used in this instrument, of the State or any subdivision thereof.’”

The foregoing amendment authorized the General Assembly to provide by law for the assessment of intangible personal property for taxation provided such was within the limitation as to the rate of such taxation and then placed such property in a separate status from all other property for tax purposes, intangible personal property being excluded from the classification as taxable property and specifically excluded from all tax levies “except such as is especially provided by the General Assembly by the authority and within the limitation of this provision. * * *”

Prior to 1932, the Code had included provisions with respect to taxation of intangible personal property along with other taxable property. In Sec. 335, 1922 Code of Laws of South Carolina (Sec. 65-1521 of the 1952 Code), other types of intangible personal property were made subject to taxation under the title “What property is taxable.” Various types of intangible personal property were included in the definition of “Personal property” in Sec. 341, Code of Laws of South Carolina, 1922 (Sec. 65-1501 (2) of the 1952 Code). The same was true with respect to the specific provision relating to returns required of insurance com-

panies, Sec. 392, Code of Laws of South Carolina, 1922 (Sec. 65-1721, 1952 Code and Sec. 65-65, 1952 Code).

Thereafter the same provisions relating to intangible personal property as a part of other taxable property were merely carried forward in Codes subsequent to the Constitutional Amendment of 1932. It is apparent, therefore, that unless the recodification of the statutes can be considered to be legislation "especially provided by the General Assembly by the authority and within the limitation" of Art. X, Sec. 1, as amended in 1932, there has been no other action on the part of the General Assembly relating thereto.

Appellants, to support their contention, cite *Parks v. Laurens Cotton Mills*, 75 S. C. 560, 56 S. E. 234; *Nexsen v. Ward*, 96 S. C. 313, 80 S. E. 599; *Colonial Life & Accident Insurance Company v. South Carolina Tax Commission*, 233 S. C. 129, 103 S. E. (2d) 908. These cases are authority for the proposition that an act of the General Assembly, invalid because of a defective title, is validated by a subsequent inclusion in the Code but are not authority for the proposition now before the Court, which is not whether there has been legislative action but whether there has been legislative action "especially provided by the General Assembly by the authority and within the limitation" of Art. X, Sec. 1, as amended in 1932. No change has been made in the statute pursuant thereto and no action taken by the General Assembly subsequent to the adoption of the amendment. We are, therefore, constrained to hold that the adoption of the Code which carried the same provisions as the previous Code relative to the subject under consideration was not such legislation as could be described as being "especially provided * * * by the authority and within the limitation" of Art. X, Sec. 1, of the Constitution as amended in 1932.

Appellants also contend that the Order appealed from should be reversed in that it held that the taxes assessed exceeded the limit of one-half of one per cent as set forth in Art. X, Sec. 1, of the Constitution. In view of the foregoing conclusion, this question becomes academic.

We are of the opinion that all exceptions should be dismissed and the Order appealed from affirmed; and it is so ordered. Affirmed.

STUKES, C. J., and OXNER, LEGGE and MOSS, JJ., concur.

17702

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Plaintiff-Appellant, and Evalene McCarley Lyda Pruitt, as Administratrix of the estate of C. Earl Lyda, Plaintiff-Respondent, v. R. A. ODOM, E. R. Watson and One 1955 Mack Truck, of whom E. R. Watson and One 1955 Mack Combination Truck are, Defendants-Appellants.

(116 S. E. (2d) 22)

Action by administratrix of deceased employee and employer's insurance carrier to recover damages for alleged wrongful death of employee in automobile accident. The Common Pleas Court, Greenville County, G. Badger Baker, J., entered order that contributory negligence of employer barred carrier's right to recover compensation paid to employee and carrier appealed. The Supreme Court, Oxner, J., held that contributory negligence of employer did not bar recovery by insurance carrier and that where mortality table and testimony relating to earnings of decedent were introduced in evidence without objection permitting counsel for plaintiff, in absence of jury and just preceding the arguments, to multiply on blackboard the decedent's alleged annual wage by his life expectancy under mortality table and to use such calculation in argument was not an abuse of discretion.

Portion of order of trial judge reducing verdict by amount of compensation paid reversed and in all other respects order affirmed.

1. NEGLIGENCE.—When injured party brings suit against one tortfeasor, fact that another party's negligence contributed to the injury does not relieve party sued of liability.

2. **WORKMEN'S COMPENSATION.**—Contributory negligence of employer in accident resulting in death of employee did not preclude employer's workmen's compensation carrier from recovering compensation paid from judgment entered against third parties in wrongful death action brought by administratrix of deceased employee and carrier. Code 1952, §§ 72-122 to 72-127, 72-422.
3. **NEGLIGENCE.**—Where employee's superior and the vice-principal or alter ego of employer was driving truck involved in collision resulting in death of employee but deceased had no voice in control of truck and did not have an equal right with driver to direct and govern its movements, negligence of driver could not be imputed to decedent on basis that decedent and driver were engaged in common enterprise.
4. **AUTOMOBILES.**—Where rear of truck was covered when accident occurred resulting in death of employee who was sitting on board in rear of body of truck with back to driver and it would have been necessary for decedent to have turned in order to look through small window in direction in which truck was moving, and front seat of truck was occupied, decedent was not guilty of contributory negligence on basis that he had placed himself in a position in truck where he could not observe the road ahead and that he thereby trusted his safety to the driver absolutely.
5. **AUTOMOBILES.**—A passenger in a motor vehicle must use ordinary care for his own safety and may not abandon exercise of his own faculties and entrust his safety absolutely to driver, regardless of imminence of danger, or visible lack of ordinary care on part of driver to avoid harm but, in absence of any fact or circumstances indicating driver is incompetent or careless, occupant of motor vehicle is not required to anticipate negligence on part of driver.
6. **APPEAL AND ERROR.**—In action for wrongful death of passenger of truck in collision, wherein main charge fully defined and explained negligence and proximate cause and on three or four occasions jury was instructed that no recovery could be had unless plaintiffs proved by preponderance of evidence that defendants were negligent and that such negligence was proximate cause of death of decedent, refusal to give defendants' instruction relating to sole negligence on part of driver of truck in which employee had been riding was not reversible error.
7. **TRIAL.**—In wrongful death action, wherein mortality table and testimony relating to earnings of decedent were introduced in evidence without objection permitting counsel for plaintiff, in absence of jury, and just preceding the arguments, to multiply on blackboard decedent's alleged annual wage by his life expectancy under mortality table and to use such calculation in argument was not an abuse of discretion.

8. DEATH.—Award of \$60,000.00 for death of man who had earned \$58.00 a week and who had life expectancy of 85.15 years and left as dependents a widow, who remarried within six months after his death, and some minor children was not excessive.

Messrs. Leatherwood, Walker, Todd & Mann, of Greenville, for Defendants-Appellants, cite: As to defense of contributory negligence being a valid defense in instant action: 204 S. C. 83, 28 S. E. (2d) 545. As to the acceptance of a Workmen's Compensation award operating as an assignment to the employer of any right to recover damages against a third party: 196 S. C. 34, 11 S. E. (2d) 453; 200 S. C. 246, 20 S. E. (2d) 707; 211 S. C. 414, 45 S. E. (2d) 809; 216 S. C. 219, 57 S. E. (2d) 308; (S. C.) 109 S. E. (2d) 706; 191 S. C. 518, 5 S. E. (2d) 299; 1 C. J. S. 1329, Sec. 104. As to doctrine of imputed negligence through joint enterprise: 181 S. C. 412, 187 S. E. 742; 53 Ohio App. 451, 5 N. E. (2d) 699. As to issue of contributory negligence of an occupant of a vehicle in a suit by such person against a third party: 181 S. C. 412, 187 S. E. 742; 18 A. L. R. 309; 22 A. L. R. 1297; 41 A. L. R. 767; 47 A. L. R. 293; 63 A. L. R. 1432; 182 S. C. 441, 189 S. E. 652; 185 S. C. 118, 193 S. E. 920; 201 S. C. 176, 21 S. E. (2d) 737. As to trial Judge's charge not being sufficient to enlighten and instruct the jury on the theory of sole negligence on the part of the driver: 224 S. C. 338, 79 S. E. (2d) 160; 172 S. C. 520, 174 S. E. 477; 38 Am. Jur. 724, Negligence, Sec. 68; 133 Conn. 463, 52 A. (2d) 433; 202 S. C. 73, 24 S. E. (2d) 121. As to verdict being excessive, and use of mathematical formulas to arrive at financial loss being erroneous: 226 S. C. 516, 85 S. E. (2d) 56; 108 S. C. 195, 93 S. E. 865; 60 A. L. R. (2d) 1347.

Messrs. Love, Thornton & Arnold, of Greenville, for Plaintiff-Appellant, cite: As to the contributory negligence and contributory willfulness of the Employer-Insurance Carrier not constituting a defense in an action against the alleged third party tortfeasor: 200 S. C. 246, 20 S. E. (2d) 707. As to there not being sufficient evidence in the record to re-

quire the issue of common or joint enterprise to be submitted to the jury: 181 S. C. 412, 187 S. E. 742; 83 S. E. (2d) 191, 225 S. C. 538; 219 S. C. 353, 65 S. E. (2d) 297. As to there not being sufficient evidence in the record to require the issue of contributory negligence on the part of the deceased to be submitted to the jury: 181 S. C. 412, 187 S. E. 742. As to the amount of the verdict, and the method used to arrive thereat, being proper: 234 S. C. 448, 465, 108 S. E. (2d) 777; 108 S. C. 195, 93 S. E. 865.

John C. Williams, Esq., of Spartanburg, for Plaintiff-Respondent, cites: As to trial Judge properly ruling to the effect that the employer and employer's insurer are barred from recovery since the jury found that the employer, through its agent, was negligent or reckless, which contributed as a proximate cause of the accident and death of the deceased: 204 N. C. 668, 169 S. E. 419; 236 N. C. 663, 73 S. E. (2d) 886; 124 Fed. Sup. 30; 11 Ill. App. (2d) 238, 136 N. E. (2d) 542; 76 F. Sup. 681; 188 Minn. 5, 246 N. W. 527; 291 Mich. 156; 8 N. Y. S. (2d) 450, 255 App. Div. 999; 21 N. E. (2d) 523, 280 N. Y. 758.

August 23, 1960.

OXNER, Justice.

About 7:40 on the morning of March 1, 1956, a pickup truck owned by Y. C. Ballenger Electrical Contractors and driven by C. H. Rogers, one of its employees, collided with a tractor-trailer unit owned by E. R. Watson and driven by R. A. Odom, one of his employees, at a point on the Greenville-Spartanburg highway near the entrance to the Winn-Dixie Warehouse. As a result of said accident, Earl Lyda, another employee of Y. C. Ballenger Electrical Contractors, who was riding in the rear of said pickup truck, received injuries from which he died shortly thereafter.

Death benefits under the Workmen's Compensation Act were duly paid to the widow and four minor children of Earl Lyda by the Indemnity Insurance Company of North America, the insurance carrier for Y. C. Ballenger Electrical

Contractors. Thereafter this action was brought by the administratrix of the estate of Earl Lyda and the Indemnity Insurance Company of North America against Odom, Watson, and the tractor-trailer to recover damages in the sum of \$100,000.00 for the alleged wrongful death of Lyda. It was alleged in the complaint that the action was prosecuted for the benefit of the insurance carrier to the extent of the amount which it had paid under the Workmen's Compensation Act, and for the benefit of the widow and children to the extent of any recovery exceeding said amount.

On the trial of the case, plaintiffs, at the conclusion of the testimony, were permitted to take a voluntary nonsuit as to Odom, leaving Watson and the tractor-trailer as the sole defendants. In addition to being required to find a general verdict, the jury was instructed to determine the following special issue: "Was the death of C. Earl Lyda caused or brought about through contributory negligence or contributory willfulness by C. H. Rogers, the driver of the pickup truck in which the deceased was riding?"

The foregoing question was answered by the jury in the affirmative and a general verdict found in favor of the plaintiffs for \$60,000.00 actual damages. An order was thereafter filed wherein the Court held that the finding on the special issue barred any recovery by the insurance carrier and accordingly directed that the amount paid by it be deducted from the verdict and judgment entered against the defendants for the balance.

The plaintiff Insurance Company has appealed from that portion of the order of the Circuit Judge holding that the contributory negligence on the part of the employer barred its right to recover the compensation paid. By numerous exceptions the defendants attack the entire judgment. There is no appeal by the administratrix.

We shall first discuss the legal effect of the finding of the jury that Rogers was guilty of contributory negligence. Such negligence, of course, must be imputed to his employer. The

jury was instructed that contributory negligence on the part of the employer would not be a complete defense but would only constitute a bar, *pro tanto*, to the recovery of compensation paid by the insurance carrier. This is the view advanced by the administratrix on this appeal. The plaintiff Insurance Company contends that upon the payment of the award of the Industrial Commission, the entire cause of action for wrongful death was assigned to it unimpaired and that the defendants are liable for the full amount of the damages sustained by Lyda's dependents, irrespective of the contributory negligence of the employer. Defendants contend that the contributory negligence of the employer constitutes a complete bar to any recovery. They say that the payment of the award by the Industrial Commission operated as an assignment to the insurance carrier of the entire cause of action stated in the complaint; that the Insurance Company is the only real party plaintiff; and that the holding of the Court below that contributory negligence only constituted a bar *pro tanto* has the effect of splitting the cause of action, which cannot be done.

Section 72-122 of the 1952 Code permits an employee having a right to recover damages against a person other than his employer, to "institute an action at law against such third person before an award is made under this Title and prosecute it to its final determination." But under the terms of Section 72-123, "either the acceptance of an award under this Title or the procurement and collection of a judgment in an action at law shall be a bar to proceeding further with the alternate remedy."

Section 72-124 provides that an acceptance of an award for compensation "shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other person for such injury or death and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative the legal

liability of such other person. * * *” Section 72-125 requires that any amount collected by the employer in excess of the amount paid by him be held for the benefit of the injured employee or other person entitled thereto and forbids any compromise settlement by the employer “in the exercise of his right of subrogation without the approval of the Commission being first had and obtained.”

Under the terms of Section 72-126, whenever an employer or his carrier has become subrogated to the right of an employee to recover damages against a third party and refuses to bring an action against such third party for three months after being requested to do so by the employee, such employee “may bring an action in his own name and for his own benefit against such third party.”

Section 72-127 reads: “The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages.”

Under the terms of Section 72-422, when the compensation is paid by an insurance carrier, such carrier becomes “subrogated to all the rights and duties of the employer and may enforce any such rights in its own name or in the name of the injured employee or his personal representative.”

The holding of the Court below that a third party may plead and prove the independent concurring negligence of the employer as a bar, *pro tanto*, to the recovery of compensation paid by the employer or insurance carrier is sustained by several decisions: *Thornton Bros. Co. v. Reese*, 188 Minn. 5, 246 N. W. 527; *Alaimo v. DuPont*, 11 Ill. App. (2d) 238, 136 N. E. (2d) 542; *Lovette v. Lloyd*, 236 N. C. 663, 73 S. E. (2d) 886. This was the construction placed upon our own Act by Chief Judge Wyche in *American Casualty Co. of Reading, Pa. v. South Carolina Gas Co.*, D. C., 124 F. Supp. 30. These courts hold that it would be unjust and inequitable to permit an employer or his insurance carrier

to recover compensation for injuries sustained in an accident to which the negligence of the employer contributed. They say that the provision subrogating an employer or his insurer to an employee's legal right in his cause of action is based upon equitable concepts and that an employer or his carrier who seeks reimbursement from a third party should be made susceptible to a demand in equity that he, himself, be free from fault. In *Lovette v. Lloyd*, *supra*, the Court said [236 N. C. 663, 73 S. E. (2d) 891]: "It is contrary to the policy of the law for the employer, or his subrogee, the insurance carrier, to profit by the wrong of the employer." But the overwhelming weight of authority is to the effect that under provisions similar to those contained in our Workmen's Compensation Act, the contributory negligence of the employer constitutes no defense to an action brought by him or his carrier against a third party to recover compensation paid. *Fidelity & Casualty Co. v. Cedar Valley Elec. Co.*, 187 Iowa 1014, 174 N. W. 709; *Graham v. City of Lincoln*, 106 Neb. 305, 183 N. W. 569; *Utley v. Taylor & Gaskin, Inc.*, 305 Mich. 561, 9 N. W. (2d) 842; *Clark v. Chicago, M., St. P. & P. R. Co.*, 214 Wis. 295, 252 N. W. 685; *Milosevich v. Pacific Elec. Ry. Co.*, 68 Cal. App. 662, 230 P. 15; *City of Shreveport v. Southwestern Gas & Elec. Co.*, 145 La. 680, 82 So. 785; *General Box Co. v. Missouri Utilities Co.*, 331 Mo. 845, 55 S. W. (2d) 442; *Williams Bros. Lumber Co. v. Meisel*, 85 Ga. App. 72, 68 S. E. (2d) 384; *Johnson v. Willoughby*, Tex. Civ. App., 183 S. W. (2d) 201; *Coleman v. Hamilton Storage Co.*, 235 Ala. 553, 180 So. 553; *Employers Mut. Liability Ins. Co. of Wisconsin v. Refined Syrups Sales Corp.*, 184 Misc. 941, 53 N. Y. S. (2d) 835; *Otis Elevator Co. v. Miller & Paine*, 8 Cir., 240 F. 376; *United Gas Corp. v. Guillory*, 5 Cir., 206 F. (2d) 49; *Marciniak v. Pennsylvania Railroad Company*, D. C., 152 F. Supp. 89; *Cyr v. F. S. Payne Co.*, D. C., 112 F. Supp. 526; *E. F. Houserman Co., for Use and Benefit of Aetna Cas. & Sur. Co. v. United States*, D. C., 103 F. Supp. 358.

In this Court the question is one of first impression.

1 After careful consideration, we have concluded that the majority view is the sounder one. It is true, as counsel for defendants suggests, that upon payment of the award, the entire cause of action for the alleged wrongful death of Lyda was assigned to the insurance carrier and the representative of his estate retained no right of action for further damages. *Dawson v. Southern Railway*, 196 S. C. 34, 11 S. E. (2d) 453; *Fuller v. Southern Electric Service Co.*, 200 S. C. 246, 20 S. E. (2d) 707, 710. But we think the insurance carrier took over unimpaired the whole cause of action against the defendants and was thus enabled to maintain any cause of action which Lyda's administratrix could have maintained had no such assignment been made. In *Fuller v. Southern Electric Service Company*, *supra*, the Court said: "The Compensation Law assigns the injured person's right of action against a tortfeasor to the employer or to the employer's insurer and enables the assignee to maintain the action which the employer could have maintained had no such assignment been made." Had this action been brought by the administratrix alone, contributory negligence on the part of Rogers would have constituted no defense. Where the injured party brings suit against one tortfeasor, the fact that another party's negligence contributed to the injury does not relieve the party sued of liability. Here it is the rights of Lyda's dependants which are being enforced and the sole test of the defendants' liability is their liability to such dependants.

We find nothing in our statute abridging or restricting the common law action assigned to the insurance carrier. It makes no exception to the subrogated right of the employer or his carrier to recover against the third party. As stated in *General Box Company v. Missouri Utilities Co.*, *supra*, 331 Mo. 845, 55 S. W. (2d) 442, 445: "The sole test of liability of the third party to the subrogated employer is the liability of the third party to the injured servant or his dependants, and it clearly is no defense to the third party's

liability for his own negligence to show that another party, his employer, was also negligent concurrently and contributing thereto. Moreover, the employer is by this statute subrogated to the rights of the injured employee, or his dependants in case of death, against the negligent third party, and the law certainly is that the right of an injured party or his dependants to recover damages against a party whose negligence caused the injury is not defeated or impaired by the fact that another party's negligence also aided or contributed to the injury."

The foregoing construction does not place an additional burden on the third party. "To hold that in such an action the defendant is liable for the full amount of the damages sustained by the employee, irrespective of the contributory negligence of the employer, is casting no burden upon the negligent third person greater than that borne by him prior to the enactment of the statute. Before the passage of any workmen's compensation acts a negligent third person was responsible for all damages sustained through his negligence to one in the employ of another, and the fact that the employer was liable for such injury jointly with a third person was no defense to such an action in whole or in part, nor could it be made the basis of any proceeding against the employer for contribution towards payment of the judgment recovered by the employee against the third person." *Milosevich v. Pacific Electric Co.*, 68 Cal. App. 662, 230 P. 15, 18.

The employer in this case and the defendants are not joint tort feassors as to decedent. The liability of the employer under the Workmen's Compensation Act arises out of contract created by law and not out of any theory of tort, and such liability is ~~not~~ concerned with any negligence on the part of the employer or employee. There is no common liability of the employer and the defendants to Lyda's dependents even though their concurring negligence caused his death.

If, as counsel for defendants seem to think, the construction we have adopted results in some instances in an in-

justice, the remedy must come from the Legislature. We are not at liberty to weigh the equities of the parties. The right given the employer or his insurance carrier under the Act is by statutory assignment rather than strict subrogation and, therefore, does not depend upon equitable principles.

It follows that the Court below erred in holding that

2 the contributory negligence of Rogers barred recovery by the insurance carrier. The exceptions by the Indemnity Insurance Company of North America are sustained.

The next question is whether the negligence of Rogers should be imputed to Lyda, the decedent, under the doctrine of common enterprise. Defendants contend that the facts established this defense as a matter of law, or at least required the submission of this issue to the jury. The Court below concluded that the decedent did not have any measure of control over, or responsibility for, the acts of Rogers in driving and, therefore, held as a matter of law that any negligence of Rogers could not be imputed to him.

The facts material to this issue are undisputed. The principal place of business of the Y. C. Ballenger Electrical Contractors was in Spartanburg, South Carolina. For four or five years this concern had been engaged on a large job in Greenville for the Duke Power Company. It was customary for the employees on this project to report for work in Spartanburg and travel to Greenville in a truck furnished by their employer, which apparently paid all costs of operation. On the morning of the accident, six of them, including the decedent, met in Spartanburg just before seven o'clock and at the time of the accident were proceeding to Greenville in a pickup truck. Rogers, who was the foreman of the crew, was driving. There is testimony to the effect that on several occasions other employees drove this truck but there is none that it was ever driven by decedent, who was only an apprentice lineman, a position inferior to that of Rogers.

Defendants contend that the fact that the occupants of this truck were fellow servants of a common master riding to-

gether in a vehicle in the course of their employment made them participants in a joint enterprise. It is said that they were then in association in the use of a vehicle for a purpose in which they had a common interest, and any negligence on the part of the driver must be imputed to the other employees. There are a few decisions, including *Lacey v. Heisey*, 53 Ohio App. 451, 5 N. E. (2d) 699, cited by defendants, which sustain this view. But the great weight of authority is to the contrary. *Kocher v. Creston Transfer Company*, 3 Cir., 166 F. (2d) 680; *Melville v. State of Maryland*, 4 Cir., 155 F. (2d) 440; *Veek v. Tacoma Suburban Lines*, 49 Wash. (2d) 584, 304 P. (2d) 700, and cases therein cited. Comment (d) to Section 491, Restatement, Torts, is as follows: "The fact that the plaintiff and the driver are fellow-servants of a common master and are both acting in the course of their master's employment and in furtherance of his business does not make them participants in a joint enterprise, and this is true irrespective of whether the vehicle is owned by the master, the fellow-servant driver or by the plaintiff himself."

But we are not required now to pass upon this conflict of authority, for here Rogers was decedent's superior and the vice-principal or alter ego of Y. C. Ballenger Electrical Contractors. *Lewis v. Trawick*, 234 S. C. 415, 108 S. E. (2d) 680. While there doubtless was a common purpose on the part of all of these employees, the decedent certainly had no voice in the control of this truck, nor did he have an equal right with the driver to direct and govern its movements, which is an essential requirement of the doctrine of common enterprise. *Funderburk v. Powell*, 181 S. C. 412, 187 S. E. 742; *Rock v Atlantic Coast Line Railway Company*, 222 S. C. 362, 72 S. E. (2d) 900; *Bolt v. Gibson*, 225 S. C. 538, 83 S. E. (2d) 191. The Court below correctly held that the negligence of Rogers could not be imputed to the decedent.

It is next contended that the decedent himself was guilty of contributory negligence. The trial Judge held that there was no evidence warranting the sub-

mission of this issue to the jury. The claim of defendants seems to be that the decedent placed himself in a position in the truck where he could not observe the road ahead and thereby entrusted his safety absolutely to the driver.

The truck in which these employees were riding had a tin top, canvas sides, with the rear and front ends made of plywood in which there was a small window. On the morning in question, the canvas sides were rolled down because of cold weather. There were two employees on the front seat of the cab with Rogers. The decedent and two other employees were sitting on a board at the rear of the body of the truck with their backs to the driver. In order to look in the direction in which the truck was moving, it would have been necessary for the decedent to have turned and looked through a small glass.

There can be no doubt of the rule that a passenger
5 in a motor vehicle must use ordinary care for his own safety and "may not abandon the exercise of his own faculties and entrust his safety absolutely to the driver, regardless of the imminence of the danger, or the visible lack of ordinary care on the part of the driver to avoid harm." *Funderburk v. Powell, supra*, 181 S. C. 412, 187 S. E. 742, 749. But as there pointed out, "in the absence of any fact or circumstances indicating that the driver is incompetent or careless, an occupant of a motor vehicle is not required to anticipate negligence on the part of the driver."

There is no evidence here that decedent had any reason to doubt the competency of Rogers as a driver. Nor can it be said that he was negligent in selecting the place which he occupied in the truck. He could not have ridden on the front seat with the driver because there was no room. He had to ride in the body of the truck where there was little or no opportunity for observing the road ahead. It has been held "that a passenger is not under the duty to ride in every circumstance in such position in the vehicle that he can observe the road ahead and warn the driver of danger." *Hamil-*

ton v. Boyd, 218 Iowa 885, 256 N. W. 290, 291. We agree with the trial Judge that the record is barren of any evidence of negligence on the part of decedent.

Error is assigned in refusing to give an instruction
6 requested by defendants relating to sole negligence on the part of Rogers. When the Court excused the jury at the conclusion of the charge and invited suggestions, counsel for defendants requested that the Court "charge is to the sole negligence of Mr. Rogers, the driver of the pickup truck, if the jury so finds, constitutes a complete defense." In refusing this request, the Court stated that it was encompassed within the instructions already given. An instruction to this effect may have been advisable, but we do not believe the jury was misled by its omission. In the main charge the Court fully defined and explained negligence and proximate cause, and on three or four occasions the jury was clearly instructed that no recovery could be had unless the plaintiffs proved by the preponderance of the evidence that defendants were negligent in one or more of the specifications alleged in the complaint and that such negligence was the proximate cause of the death of the decedent. From these instructions, the jury must have clearly understood that liability could not be founded upon the sole negligence of Rogers. Their finding of actionable negligence on the part of defendants eliminated, as a practical matter, any question of sole negligence on the part of anyone else. We find no reversible error in the refusal of defendants' request.

We now come to the exception relating to argument
7 of counsel. Just preceding the arguments, the attorneys for plaintiff, in the absence of the jury, multiplied on a blackboard the figure 58, the alleged weekly wage of decedent, by 52, which gave a product of 3,016, his alleged annual wage, which was then multiplied by 35.15, his years of life expectancy under the mortality table, giving a product of \$106,112.60. (While immaterial, the calculator made a slight mistake. The total should have been \$106,012.40.) From this tabulation, plaintiffs' counsel were permitted, over

defendants' objection, to argue that the beneficiaries sustained a pecuniary loss of \$106,112.40. Defendants claim that the argument based on this computation was improper and highly prejudicial because it was without evidentiary support and amounted to the introduction of evidence. They say that the widow of decedent remarried six months after his death and ceased to be a dependent (she married a Mr. Pruitt on September 22, 1956); and that while decedent earned \$58.00 a week when working, due to weather conditions and other circumstances, he was unable to work full time.

In support of the foregoing contention, counsel for defendants call our attention to an annotation in 60 A. L. R. (2d) beginning on page 1347, from which it appears that in a number of jurisdictions the courts refused to permit counsel in personal injury damage suits to suggest monetary mathematical formulas to a jury for the computation of compensation for pain and suffering. These courts say such suggestions have no foundation in the evidence, and import into the trial elements of sheer speculation on a matter which by universal understanding is not susceptible of evaluation on any such basis and constitute an unwarranted intrusion into the domain of the jury.

We do not think the decisions relating to the use of a blackboard in making per diem or other mathematical computation of the amount to be awarded for pain and suffering control the question now presented. The assessment of damages for pain and suffering involves much more speculation than fixing compensation for loss of support. The recent case of *Cross v. Robert E. Lamb, Inc.*, 60 N. J. Super. 53, 158 A. (2d) 359, cited in oral argument by defendants' counsel, is more to the point. But there the facts differ from those in the instant case in several material particulars.

In *Johnson v. Charleston & Western Carolina Railway Co.*, 234 S. C. 448, 108 S. E. (2d) 777, 785, an action for alleged wrongful death, counsel for plaintiff multiplied on a blackboard the decedent's annual income by his life expectancy and used it in his argument as a basis for the

pecuniary loss sustained by the beneficiaries. Defendant's counsel made no contention that this use of the blackboard was improper. Their only contention was that the jury should have been instructed that the calculations made on it should not be considered as evidence. We were, therefore, not called upon to determine the question now presented. However, the following general observation was made: "There is no impropriety in counsel's use of a blackboard, during his argument to the jury, for the purpose of fairly illustrating points that are properly arguable. * * * Calculations made, or diagrams drawn, thereon are of course not evidence. Like statements of counsel in oral argument, they should have reasonable foundation in the evidence or in inferences fairly arguable from the evidence. Just as oral argument may be abused, so may such visual argument; and its abuse may be so flagrant as to require a new trial. Control of the arguments of counsel, with regard to the use of such visual aids, as with regard to oral statements, rests in the sound discretion of the trial judge."

We think the use of the blackboard here substantially complied with the foregoing rule. At least it cannot be said there was a manifest abuse of discretion on the part of the trial Judge in permitting counsel to make this computation and use it in argument. It does not appear that the figures are wholly unsupported by the evidence. The mortality table was introduced in evidence without objection, so was the testimony relating to the earnings of the decedent. It is true that the widow remarried, but the decedent also left as dependents some minor children. The contingencies now mentioned by counsel for defendants were doubtless advanced in argument and from the size of the verdict evidently given proper weight by the jury. As stated by the trial Judge, while the argument made by counsel for plaintiffs might "not fully withstand the scrutiny of reason", it did "not amount to the introduction of evidence for it comes from the testimony and is not derived from speculation and conjecture."

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Finally, it is contended that the verdict is against the weight of the evidence and the amount is so grossly excessive as to indicate that it was the result of passion, prejudice and caprice. There is abundant evidence to sustain liability. The amount awarded is not excessive.

The exceptions by the Indemnity Insurance Company of North America are sustained. Those of defendants are overruled. That portion of the order of the trial Judge reducing the verdict by the amount of compensation paid is reversed but in all other respects is affirmed. The case is remanded for entry of judgment in favor of plaintiffs for the full amount awarded by the jury with interest and costs.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

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Nat B. WILLIAMS, William Watson Barron, Joe Steele, Robert A. Gettys, and W. LeRoy Williams, Individually, and as citizens and taxpayers of the Town of Ebenezer, York County, S. C., for and in behalf of themselves and all other citizens and taxpayers similarly situated and interested who care to join in this action as parties-plaintiffs, Appellants, v. Russell JACOBS, Intendant, Floyd O. Hammond, Carl Mixon, Luther B. Horton, Wardens of the Town of Ebenezer, S. C., and John A. Hardin, Mayor and W. P. Sibley, Charles M. Sturgis, C. A. Reese, Jr., and W. B. Byers, as Aldermen of the City of Rock Hill, S. C., and Paul G. Plexico, as Intervenor, Respondents.

(116 S. E. (2d) 157)

Action to have declared null and void all proceedings in election held for purpose of annexing town to city. The Common Pleas Court, York County, James Hugh McFaddin, J., entered order approving annexation, and citizens and taxpayers of town appealed. The Supreme Court, Taylor, J., held that under statute providing that, to effect extension of boundaries of municipality, petition shall be first submitted to council by majority of freeholders of territory to be

annexed, names on petition, when filed and acted upon by annexing body, could not thereafter be ratified.

Order reversed; proposed annexation declared null and void.

1. **MUNICIPAL CORPORATIONS.**—Annexation of an incorporated town is authorized.
2. **MUNICIPAL CORPORATIONS.**—Petition for annexation to a municipality should be in such form as to comply with statutes providing therefor and of such substance that those charged with determining sufficiency thereof might do so without it being necessary to investigate by what authority certain names were affixed thereto when it appears that such names are not the signatures of freeholders of the territory proposed to be annexed, thereby avoiding much confusion, or in some instances the possibility of fraud. Code 1952, § 47-12.
3. **MUNICIPAL CORPORATIONS.**—Under statute providing that to effect extension of boundaries of municipality petition shall be first submitted to council by majority of freeholders of territory which is proposed to annex, names on petition, when filed and acted upon by annexing body, could not thereafter be ratified. Code 1952, § 47-12.
4. **EQUITY—INJUNCTION.**—In action to have declared null and void all proceedings in election held for purpose of annexing town to city, wherein citizens and the taxpayers of town had obtained temporary injunction or restraining order against the taking over of town affairs by city, but had failed to comply with the order by putting up injunction bond, and order or injunction was dissolved, order was nullity if it granted injunctive relief, but regardless of whether there was a temporary restraining order or an injunction, town and city officers were not prejudiced by the failure to put up the bond, and appeal by citizens and taxpayers from order approving annexation was not precluded on theory that they had failed to come into court with clean hands. Code 1952, § 47-12.

Charles W. McTeer, Esq., of Chester, for Appellants, cites: As to there being no statute authorizing annexation of an incorporated town: 224 S. C. 166, 77 S. E. (2d) 900; 218 S. C. 22, 61 S. E. (2d) 399. As to the petition for election not being signed by majority of freeholders: 18 Am. Jur. 244; 28 Am. Jur. 165; 194 S. E. 721; 2 Am. Jur. 211; (Ga.) 81 S. E. (2d) 309; 214 S. C. 274, 52 S. E. (2d) 204; 18 Am. Jur. 245; 28 Am. Jur. 165, 184; 112 N. M.

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50, 11 L. R. A. (N. S.) 372. *As to the election being invalid:* 18 Am. Jur. 181; 18 Am. Jur. 298.

Messrs. Spencer & Spencer, Charles B. Ridley and Robert M. Ward, of Rock Hill, for Respondents, cite: As to there being ample statutory authority for the annexation at issue here: 224 S. C. 166, 77 S. E. (2d) 900; 50 Am. Jur. 236, Statutes, Sec. 242; 43 S. C. 80, 20 S. E. 738, 28 L. R. A. 402; 78 S. C. 348, 58 S. E. 937; 228 S. C. 340, 90 S. E. (2d) 212; 234 S. C. 172, 107 S. E. (2d) 33; 231 S. C. 61, 97 S. E. (2d) 210. *As to the petition for election being signed by a majority of the freeholders:* 97 S. C. 1, 81 S. E. 958; 222 N. C. 585; 44 C. J. 237, Municipal Corporations, Sec. 2395; 87 Ark. 257, 105 S. W. 265; 193 S. C. 299, 8 S. E. (2d) 511; 208 S. C. 406, 38 S. E. (2d) 147; 2 C. J. 485, Agency, Sec. 104; 2 C. J. 516, Agency, Sec. 138; 2 C. J. 469, Agency, Sec. 82; 2 C. J. S. 1077, Agency, Sec. 38; 2 C. J. S. 1088, Agency, Sec. 44; 18 Am. Jur. 259, Elections, Sec. 123; 207 Ind. 65, 191 N. E. 155, 92 A. L. R. 1508; 92 A. L. R. 1513; 11 L. R. A. (N. S.) 372; 15 L. R. A. 501; 2 McQuillan on Municipal Corporations (3rd), Sec. 7.33; 230 S. C. 478, 96 S. E. (2d) 828; 234 S. C. 113, 107 S. E. (2d) 10. *As to the election being valid and proper:* 20 C. J. 56, Elections, Sec. 3; 18 Am. Jur. 343, Elections, Sec. 248; 225 S. C. 408, 82 S. E. (2d) 789; 18 Am. Jur. 300, Elections, Sec. 183; 18 Am. Jur. 302, Elections, Sec. 184. *As to appellants being entitled to no relief from a Court of Equity so long as they remain in violation of the Order to post bond:* Pom. Eq. Jur. Vol. 1, Sec. 387, p. 642; 19 Am. Jur. 322, Sec. 466; 211 S. C. 255, 44 S. E. (2d) 611; 226 S. C. 598, 86 S. E. (2d) 477.

September 13, 1960.

TAYLOR, Justice.

This appeal arises out of an action brought in the Court of Common Pleas for York County, seeking to have declared null and void all proceedings in the election held for the purpose of annexing the Town of Ebenezer in York County to the City of Rock Hill.

This matter was submitted to the hearing Judge upon the following Stipulation of Facts:

"1. That this action was commenced on the 5th day of December, 1959, for the purpose of having declared null and void a special election and annexation of the Town of Ebenezer with the City of Rock Hill, which special election was held on December 1, 1959, plaintiffs asserting invalidity thereof.

"2. That the City of Rock Hill is a city having more than 5,000 inhabitants and is chartered under the general laws of South Carolina.

"3. That the Town of Ebenezer is a town having a population of 633 inhabitants according to the 1950 census and was chartered under the general law of the State of South Carolina on December 18, 1923, as a town having less than 1,000 inhabitants.

"4. That certified copies of minutes of meetings of Rock Hill and Ebenezer councils and any correspondence between said municipalities, or their officials concerning the annexation proceedings, shall be received in evidence, subject to interpretation thereof by the Court.

"5. That both the Rock Hill and the Ebenezer councils investigated the sufficiency of the Annexation Petitions and officially found and determined as a result of their separate investigations that the Petitions were signed by a majority of the freeholders of the Town of Ebenezer. The records of these bodies indicate reports to them showing an initial count of approximately 240 freeholders and, based on the 240 freeholders count, not less than 137 valid signatures reported to the Rock Hill Council and not less than 135 valid signatures reported to the Ebenezer Council.

"6. The Rock Hill Council, after re-examination of its determination of sufficiency of the Annexation Petitions in the light of the allegations of plaintiffs' Complaint, reaffirmed its determination of sufficiency of the Petitions in a resolution adopted January 9, 1960, copy of which is to be received in evidence.

"7. Defendants' Exhibits 1 through 5 shall be received in evidence along with the supporting affidavits and analysis attached. They show a revised freeholders' count of 309. The revised count of 309 freeholders is to be accepted as correct and will include the original 240 freeholders as listed, as modified by said exhibits. A list showing the initial 240 count freeholders' tabulation, with 134 check marks thereon showing the initial signature count to this extent is to be received in evidence.

"8. Defendants Exhibits 1 through 5 analyze in detail the plaintiffs' claims for variation from an initial count of 135 valid signatures. They show a revised count of 175 signatures, including 11 signatures sought to be withdrawn by plaintiffs, through Exhibit 4. Of the 175 claimed signatures, part are dependant upon validity of instruments of ratification, filed with the City of Rock Hill, and to be received in evidence and construed by the Court. The Court shall determine whether or not 11 signatures on Exhibit 4 shall be withdrawn and excluded, as sought by plaintiffs, or retained and included as sought by defendants. No request for withdrawal was made to the City of Rock Hill. If withdrawal is allowed as claimed by plaintiffs, defendants then ask to be allowed to count 14 additional signatures admittedly never filed and received, but ready to have been offered if withdrawals and additions had been allowed, which the Ebenezer Council declined to permit.

"9. The original Petitions will be received in evidence.

"10. That the exact date of the presentation of the said petition to the two councils is in dispute and must be gathered from the minutes of meetings and correspondence between the Mayors.

"11. That on November 14, 1959, at a meeting of the Town Council of Ebenezer there was presented to said Council 11 affidavits of persons who signed said petition asking that their names be withdrawn.

"12. That on the 14th day of November, 1959, after the meeting, the Town Council of Ebenezer referred said petition

to A. C. Burgess for him to check and verify said petition and on the 16th day of November, 1959, the said A. C. Burgess made a written report to said Town Council which appears as part of the exhibits in this case.

"13. That a notice of special election was duly published on November 20, 1959, in the Rock Hill Evening Herald by the Commissioners of Election for York County, S. C.

"14. The said election was duly held in the Town of Ebenezer and in the City of Rock Hill, S. C. on December 1, 1959.

"15. That on December 1, 1959, there was also held the regular primary election for Mayor and City Councilmen of Rock Hill and the regular general election for councilmen of Ebenezer and the same polling precincts and managers were used in the regular election and the special election.

"16. That at such election 156 votes were cast in the Town of Ebenezer in favor of annexation and 89 votes were cast opposing said annexation; and 1,041 votes were cast in the City of Rock Hill in favor of annexation and 526 votes were cast opposing annexation.

"17. That the form of ballots used in said special election is shown by the defendants' Exhibit No.——attached hereto.

"18. That on December 5, 1959, action was duly commenced by service of Summons and Complaint attacking the validity of annexation of the Town of Ebenezer with the City of Rock Hill and service was duly made on the officials of Ebenezer and the City of Rock Hill.

"19. That, subsequently, on the 8th day of December, 1959, plaintiffs obtained a temporary injunction enjoining the City of Rock Hill from taking over the affairs of the Town of Ebenezer.

"20. That on the 30th day of December, 1959, the Resident Circuit Judge of the Sixth Judicial Circuit ordered the plaintiffs to put up \$4,000.00 injunction bond within three days and plaintiffs failed to post said bond.

"21. That defendants reserve in its entirety their legal position that the finding and determination of sufficiency of the petitions by the Rock Hill City Council and also by the Ebenezer Council is binding upon the court in the absence of a showing of abuse of discretion, caprice or fraud, which is not alleged; and that the plaintiffs are entitled to no affirmative relief under defendants' motion dated January 11, 1960; and the making of this Stipulation shall not constitute a waiver of said positions.

"22. The defendant City of Rock Hill reserves in its entirety its legal position that the procedure for reduction of corporate limits does not apply to the present annexation proceedings and that only the filing of the petitions with the City of Rock Hill and its finding of sufficiency thereof is of controlling legal effect and significance; and the making of this Stipulation shall not constitute a waiver of said position.

"23. Under the facts stipulated herein, the following questions are presented for determination by the Court:

"(a) 16 married couples own their property jointly and are included as two freeholders each in the revised count of 309 freeholders. As to these couples the petitions were signed in some cases 'Mr. & Mrs.,' and in some cases 'Mr.,' and in some cases 'Mrs.'. Are the defendants entitled to count these signatures as claimed by them, as follows:

"(1) 8 signatures as 'Mr. & Mrs.,' counted as 16 petitioners, after ratification by separate signature of husband and of wife.

"Yes No

"(2) 8 signatures as 'Mr.,' counted as 16 petitioners, after ratification by separate signatures of wife and husband.

"Yes No

"(b) 4 wives owned property in their own names only and are included as 1 freeholder each in the revised count of 309 freeholders.

"As to these wives the petitions were signed in some cases as 'Mr. & Mrs.' and in some cases as 'Mr.' Are the

defendants entitled to count these signatures as claimed by them, as follows:

“(1) 1 signature as ‘Mr. and Mrs.’ counted as 1 petitioner after ratification by separate signatures of husband and wife, who state that wife signed initially (George Douglas).

“(2) 3 signatures as ‘Mr.’ counted as 3 petitioners after ratification by signature of wife or by separate signature of wife and husband.

“Yes No

“(c) 4 husbands owned property in their own names only and are included as 1 freeholder each in the revised count of 309 freeholders.

“As to these husbands the petitions were signed in some cases as ‘Mr. & Mrs.’ and in one case as ‘Mr.’ by ‘Mrs.’ Are the defendants entitled to count these signatures as claimed by them, as follows:

“(1) 3 signatures as ‘Mr. & Mrs.’, counted as 3 petitioners, after ratification by separate signatures of husband and wife. One of the 3 ‘Mr. & Mrs.’ signatures was signed by the husband and owner according to the statement of ratification (L. H. Dickert). Defendants contend and plaintiffs agree that of the other two, the signatures show that one was signed by the husband, one by the wife (Hinson and Helms, respectively).

“Yes No

“Correct count should be 2 . . . or 1 . . . or 0 . . .

“(2) 1 signature as ‘Mr.’ signed by wife, counted as one petitioner after ratification by separate signatures of husband and wife (Proctor).

“Yes No

“(d) 2 corporate signatures by an officer on behalf of the corporation are questioned by plaintiffs on grounds of no evidence of corporate authority in the signing officer. The defendants have obtained instruments of ratification intended to evidence proper authorization for signature on behalf of the corporation.

"Are the defendants entitled to count these 2 signatures as claimed by them?

"Yes No

"(e) 16 tenants in common, representing 4 estates, are being added to the freeholders' list, in addition to one other freeholder for each such estate already counted. Each of the 16 tenants in common have signed instruments of ratification asking that the signature by the initial freeholder counted as a petitioner with reference to the respective property owned by each, be treated as including the other tenants in common.

"Are the defendants entitled to claim 16 additional petitioners under the instruments of ratification mentioned?

"Yes No

"(f) 11 affidavits requesting withdrawal of names from the Annexation Petitions were filed with the Ebenezer Council on November 14, but the Council declined to permit withdrawal. The minutes reflect the receipt, handling and final action on the petitions by the Ebenezer Council. Plaintiffs contend withdrawal of these names should be allowed. No request for withdrawal was made to the Rock Hill Council.

"(1) Should the 11 names be stricken from the valid signature list?

"Yes No

"(2) If so, should defendants be allowed to add and count 14 additional signatures which would have been offered if any change in the petitions had been allowed?

"Yes No

"24. As a direct result of adding additional freeholders, 9 additional petitioners who had already signed but were not counted because not on the original freeholders' list, shall be added to the original count of valid signatures of 135 as found by Ebenezer or 137 as found by Rock Hill as determined proper by the Court.

"What figure does the Court adopt?

"25. To the original count determined by the Court the following additional adjustments shall be made based on the

answers to the questions posed in paragraph 23 above, as follows:

"23 (a) (1) If yes, add 8. If no, no change.

"(2) If yes, add 8. If no, no change.

"(b) (1) If yes, no change, If no, deduct 1.

"(2) If yes, add 1. If no, deduct 2.

"(c) (1) If 3, no change. For any less deduct accordingly.

"(2) If yes, no change. If no, deduct 1.

"(d) If yes, no change. If no, deduct 2.

"(e) If yes, add 16. If no, no change.

"(f) (1) If yes, deduct 11. If no, no change.

"(2) If yes, add 14. If no, no change."

The hearing Judge after hearing counsel and considering briefs duly filed his Order approving annexation of the Town of Ebenezer to the City of Rock Hill; and plaintiffs appeal, contending, first, that the statutes do not authorize the annexation of an incorporated town; second, that the petition for election was not signed by a majority of the freeholders; third, that the election was invalid; and Respondents present the additional sustaining ground that the action should have been dismissed for appellants' failure to give bond.

The first question must be resolved against contention of plaintiffs. See *Town of Forest Acres et al. v. Seigler et al.*, 224 S. C. 166, 77 S. E. (2d) 900.

Questions 2 and 3 relate to the validity of the petition and rely primarily upon whether or not the petition requesting the election was signed by a majority of the freeholders, of the Town of Ebenezer, which in turn depends upon whether certain names placed upon the petition by others might thereafter be ratified.

The stipulation sets forth that the City Council of Rock Hill fixed by resolution the count of 309 freeholders. The Court subsequently reduced this number to 307 by elimination of two corporations. 154 freeholders' signatures, there-

fore, were required upon the annexation petition to constitute a majority of the 307 freeholders.

Sec. 47-12, Code of Laws of South Carolina, 1952, provides:

"To effect any such extension a petition shall first be submitted to the council by a majority of the freeholders of the territory which it is proposed to annex, accompanied by an adequate description thereof, praying that an election be ordered to see if such territory shall be included in the city or town."

After commencement of these proceedings, the City Council of Rock Hill re-examined the petition and declared that 137 freeholders signed the petition, that 9 persons counted as freeholders had not been counted as signers of the petition and should be added to the petition. The hearing Judge accepted the finding of the City of Rock Hill that the petition was signed by 137 freeholders, plus the 9 agreed to by the Council or a total of 146, and added 17 additional names for a total of 163, less the two corporations, or 161 valid petition signers by concluding that the questions posed in paragraph 23 of the Stipulations should be answered as follows:

- | | |
|-----------------------|------------|
| 23. (a) (1)—Yes | Add 8. |
| 23. (a) (2)—Yes | Add 8. |
| 23. (b) (1)—Yes | No change. |
| 23. (b) (2)—Yes | Add 1. |
| 23. (c) (1)—Yes | No change. |
| 23. (c) (2)—Yes | No change. |
| 23. (d)—No | Deduct 2. |
| 23. (e)—No | No change. |
| 23. (f) (1)—No | No change. |
| 23. (f) (2)—No | No change. |

A breakdown of this group of signers reveals that:

23 (a) (1) involves a situation where 8 married couples owned property jointly and were counted as 16 freeholders. The petition was signed "Mr. and Mrs." by either the husband or the wife. The respondents had both husband and

wife to ratify this signing after commencement of these proceedings.

23 (a) (2) involves a situation where 8 married couples owned property jointly and the petition was signed only by husband or wife and only the name of the husband or wife appeared thereon. The respondents had both husband and wife to ratify the signing after the commencement of these proceedings.

23 (b) (2) involves a situation where the title to the property was in the name of the wife but the husband signed his name to the petition.

23 (c) (1) involves a situation where property is owned by 3 husbands. Two husbands signed the petition "Mr. and Mrs." and the wife of the third signed "Mr. and Mrs."

23 (c) (2) involves a situation where the husband owned the property and the wife signed his name to the petition and her signing was subsequently ratified after commencement of these proceedings.

The question of ratification of signatures to a petition wherein the signer assumes no liability is one of novel impression in this State. We, therefore, must look to the wording of the statute and to the decisions of other jurisdictions for guidance.

Defendants to sustain their contention that the questioned signatures should be ratified relies upon the principle of agency that one may ratify the act of another and such ratification relates back to the time when the unauthorized act was done and makes it as effective from that time as though it had been originally authorized, and that therefore upon ratification the parties to all intents and purposes stand in the same position, in respect to rights and liabilities arising out of such act, as though the person assuming to act as agent had acted under authority previously conferred. That a valid ratification creates or establishes the relation of agency in respect to a matter as to which none before existed, and renders valid and binding the unauthorized act or contract

which before was invalid and such ratification operates not merely as presumptive evidence of previous authority, but *per se* as a confirmation of the act of the agent.

In 2 Am. Jur. 177, Agency, Sec. 222, the rule is stated to be:

"The doctrine is well recognized that in order that an act or contract may be the subject of ratification, there must be some relationship, actual or assumed, of principal and agent between the person alleged to have made such act or contract his own and the party by whom the contract was entered into or the act performed. Hence, the act or contract must purport to be done or made at its inception in behalf of the principal; there can be no ratification where it appears that the person who performed the act or made the contract was not at the time, and did not profess to be, acting on behalf of the alleged principal. * * *

Our own case of *Carson et al. v. Coleman*, 208 S. C. 406, 38 S. E. (2d) 147, is cited as sustaining the principle of agency and with this we are in accord; but that case involved ratification of the wife of acts of the husband in the sale of land wherein she had received the benefits of monies paid as a result of the sale. We do not, therefore, consider it as being of aid in the problem now under consideration.

In *Lancaster et al. v. Town Council of Brookland*, 160 S. C. 150, 158 S. E. 233, 235, this Court had under consideration the proposed annexation of additional territory to a municipality and held that a legislative act confirming the annexation election, which had been held as a result of a petition which was not signed by a majority of freeholders in the territory to be annexed, was unconstitutional, it being stated therein that the town or city had the right to extend the corporate limits only in the following manner:

" 'A petition shall first be submitted to said council by a majority of the freeholders of the territory which it is proposed to annex, praying that an election be ordered to see if such territory shall be included in said town,' * * * This

general law which, it is declared, shall be uniform and is intended to apply to every city and town in the state, in effect says to Lexington and Batesburg and Saluda and others, 'You can only extend the corporate limits of your town by complying with the provisions of Section 4385 of the Code; you must have a petition signed by the majority of the freeholders of the territory you propose to annex before you may order an election.' "

The foregoing is not exactly on point as it involved the question of validating an election by legislative act, but its reasoning is of interest.

Also of interest is *Poole et al. v. Tiner et al.*, 208 S. C. 481, 38 S. E. (2d) 650, 651, which concerned signatures to petition for election of a school trustee. Some signers contended that they had been misled by fraudulent statements of those procuring signatures and sought to have their names removed therefrom. The request was refused and this Court affirmed, citing *Hawkins et al. v. Carroll et al.*, 190 S. C. 11, 1 S. E. (2d) 898, 126 A. L. R. 1028, reasoning that the public had vested interest in the proceeding and it was no longer one where the rights of the signers only were to be considered.

In *State ex rel. Kugler v. Tillatson*, Mo. App., 304 S. W. (2d) 485, 487, the Supreme Court of Missouri had under consideration a question somewhat similar to the one at bar. Involved was the proposed change of a school district's boundaries under a statute which required that the petition be signed by qualified voters. Some of those signing did not personally sign the petition and it was contended that since the names of those who did not personally sign the petition were affixed with their personal knowledge and consent those names should constitute valid signatures of the person so consenting. The Court in passing upon this question stated:

"We are mindful of the rule that one may obligate himself by ratifying a signature made for him by another (80 C. J. S. Signatures § 6, p. 1291), but the signatures required

here carry no obligation. If it was not the rule that the taxpayer himself should sign, the sufficiency of the petition could not be determined by checking the signatures and it would be necessary to investigate by what authority names were affixed when it appeared that signatures upon the petition were not those of voters and taxpayers. It will readily be seen that this would place a burden upon the board which would be neither desirable nor in contemplation of the statute."

In instant case no obligation attached to those signing the petition; hence, there is no obligation to ratify. However, a certain amount of responsibility does attach—responsibility to give the matter at hand due consideration and responsibility to one's co-signer, and other residents of the area affected. The petition when filed should be in such form as to comply with the statutes providing therefor and of such substance that those charged with determining the sufficiency thereof might do so without it being necessary to investigate by what authority certain names were affixed thereto when it appears that such names are not the signatures of freeholders of the territory proposed to be annexed, thereby avoiding much confusion, as here, or in some instances the possibility of fraud.

Sec. 47-12, Code of Laws of South Carolina, 1952, requires as a prerequisite to such election that "a petition shall first be submitted to the council by a majority of the freeholders of the territory proposed to annex, * * *".

The names on the petition when filed and acted upon by the annexing body could not be thereafter ratified; and it is evident that unless the questioned names are counted the petition is deficient in that it was not by a majority of the freeholders of the territory to be annexed.

Defendants urge as a sustaining ground that this appeal should be dismissed because plaintiffs failed to post an injunction bond as required by Judge Gregory in his Order of December 30, 1959, and, therefore are

not entitled to affirmative relief in that they do not come into Court with clean hands. The proceedings were commenced December 8 by what was denominated "Rule to Show Cause and Temporary Restraining Order." No time was set therein for the hearing of the Rule. Defendants, however, did not move to vacate or modify such Order as they had a right to do upon giving 4 days' notice. On January 18, 1960, Honorable James Hugh McFaddin, presiding Judge, refused defendants' motion for dismissal of the action but dissolved the Temporary Restraining Order or Injunction as the case might be. If it be considered an Injunction and the mandatory bond not supplied, the Order in so far as it granted injunctive relief was a nullity. *Ex parte Jones et al.*, 160 S. C. 63, 158 S. E. 134, 77 A. L. R. 235. If it be considered a Temporary Restraining Order, no question arises. In either event, defendants were in nowise injured or prejudiced. *Arnold et al. v. City of Spartanburg et al.*, 201 S. C. 523, 23 S. E. (2d) 735. The additional sustaining ground is, therefore, deemed to be without merit.

For the foregoing reasons, we are of opinion that the Order appealed from must be reversed and the proposed annexation of the Town of Ebenezer to the City of Rock Hill declared null and void; and it is so ordered. Reversed.

STUKES, C. J., and OXNER, LEGGE and MOSS, JJ., concur.

17704

T. Lewis COX, individually and as a taxpayer on behalf of himself and all others, similarly situated, too numerous to mention, who may join and share in the benefits and burdens of this action, Plaintiff, v. Jeff B. BATES, as Treasurer of the State of South Carolina, and E. C. Rhodes, as Comptroller General of the State of South Carolina, Defendants.

(116 S. E. (2d) 828)

Original proceeding brought by taxpayer on behalf of himself and all others similarly situated against state Treasurer and Comptroller General of state challenging consti-

tutionality of law providing for creation and maintenance of state reserve fund and for distribution of surplus funds to counties for public school purposes. The Supreme Court, Stukes, C. J., held that under statute, no tax was levied and statute was not unconstitutional on ground that appropriation to counties did not sufficiently specify object and purposes of appropriation.

Judgment accordingly.

OXNER, J., dissented.

1. **STATUTES.**—Statute providing for creation and maintenance of state reserve fund from excess revenues and for distribution of surplus funds to counties for general public school purposes “as directed by a majority of the respective legislative delegations, including the senator”, was complete and valid despite unconstitutionality of quoted phrase and was capable of enforcement without it. Act March 20, 1954, pt. 3, §§ 2, 3, 48 St. at Large, pp. 1676, 1677; Act May 15, 1959, § 14; 51 St. at Large, pp. 617, 618; Act May 16, 1960, pt. 2, § 18, 51 St. at Large, p. 1901; Const. art. 1, § 14.
2. **EVIDENCE.**—It will be presumed that county authorities will observe law providing for distribution of surplus funds to counties for general public school purposes. Act March 20, 1954, pt. 3, §§ 2, 3, 48 St. at Large, pp. 1676, 1677; Act May 15, 1959, § 14, 51 St. at Large, pp. 617, 618; Act May 16, 1960, pt. 2, § 18, 51 St. at Large, p. 1901; Const. art. 1, § 14.
3. **CONSTITUTIONAL LAW.**—Supreme legislative power of state is vested in the General Assembly.
4. **CONSTITUTIONAL LAW.**—Provisions of state constitution are not a grant, but a limitation of legislative powers, so that General Assembly may enact any law not expressly, or by clear implication, prohibited by state or federal Constitution.
5. **CONSTITUTIONAL LAW.**—A statute will, if possible, be construed so as to render it valid and every presumption will be made in favor of constitutionality of a legislative enactment.
6. **CONSTITUTIONAL LAW.**—A statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution.
7. **STATES.**—Section of Constitution providing that General Assembly shall provide for annual tax sufficient to defray estimated expenses of state for each year and that when ordinary expenses of state exceed income for such year General Assembly shall provide for levying a tax sufficient to pay deficiency of preceding year together

with estimated expenses of ensuing year, does not forbid creation of a surplus and did not prohibit creation and maintenance of a state reserve fund for distribution of surplus funds to counties for general public school purposes. Act May 16, 1960, pt. 2, § 18, 51 St. at Large, p. 1901; Const. art. 10, § 2.

8. **STATES.**—Under statute providing for creation and maintenance of state reserve fund from excess revenues, reserve fund was not an appropriation in the ordinary meaning of the word. Act May 16, 1960, pt. 2, § 18, 51 St. at Large, p. 1901.
9. **SCHOOLS AND SCHOOL DISTRICTS.**—Under statute providing for creation and maintenance of state reserve fund from excess revenues and for distribution of surplus funds to counties for general public school purposes, appropriation to counties was contingent upon existence of a surplus in state treasury and legislation was not in the nature of a contract and was subject to repeal by General Assembly. Act May 16, 1960, pt. 2, § 18, 51 St. at Large, p. 1901.
10. **STATES.**—Under statute providing for creation and maintenance of state reserve fund from excess revenues and for distribution of surplus funds to counties for general public school purposes, no tax was levied and statute was not unconstitutional on ground that appropriation to counties did not sufficiently specify object and purposes of appropriation. Act May 16, 1960, pt. 2, § 18, 51 St. at Large, p. 1901; Act March 20, 1954, pt. 3, §§ 2, 3, 48 St. at Large, pp. 1676, 1677; Const. art. 4, § 23; art. 10, § 3.
11. **COUNTIES.**—Counties are but arms of the state and are subject to control by General Assembly.
12. **STATUTES.**—Title of statute providing that it was to appropriate funds from surplus revenues to a general reserve fund and for additional school aid to counties of state sufficiently specified objects of appropriations and made them into distinct items and sections as required by Constitution. Act May 20, 1954, 48 St. at Large, p. 1566; Const. art. 4, § 23.
13. **STATES.**—Statute providing for creation and maintenance of state reserve fund from excess revenues and for distribution of surplus funds to counties for general public school purposes was not objectionable on ground that appropriation of surplus to counties was in an indefinite amount. Act May 20, 1954, 48 St. at Large, p. 1566.

Messrs. E. W. Johnson, of Spartanburg, Alfred F. Burgess, of Greenville, Dorcey Lybrand, of Aiken, Hugh L. Willcox, of Florence, Frank H. Bailey, of Charleston, for Plaintiff, cite: As to Part III, Section 3, of Act No. 644, Acts of 1954, 48 Statutes at Large 1676, and the 1960 Amendment thereto, Part II, Section 18, Acts of 1960,

Statutes at Large, being unconstitutional in that they violate Article I, Section 14, of the South Carolina Constitution of 1895: 234 S. C. 35, 106 S. E. (2d) 665; 186 S. C. 134, 195 S. E. 257; 211 S. C. 77, 44 S. E. (2d) 88, 173 A. L. R. 397; 135 S. C. 348, 132 S. E. 673; 209 S. C. 19, 39 S. E. (2d) 133; 216 S. C. 52, 56 S. E. (2d) 723. *As to the opinions of the Attorney General being entitled to great weight:* 215 S. C. 224, 54 S. E. (2d) 791; 37 F. Supp. 972, Affirmed 121 F. (2d) 631, Certiorari denied; 52 Colo. 189, 120 Pac. 153, Ann. Cas. 1913 C 1304; 305 Ill. 223, 137 N. E. 118, 26 A. L. R. 16; 121 Tex. 94, 45 S. E. (2d) 130, 79 A. L. R. 983, Attorney General, Par. 14, p. 244. *As to the unconstitutional parts not being severable from the remainder of Section 3 of Part III of the Act and the entire Section 3 is, therefore, unconstitutional:* 190 S. C. 270, 2 S. E. (2d) 777; 158 U. S. 601, 155 S. Ct. 912, 39 L. Ed. 1108; 11 Am. Jur. 487, Constitutional Law, Sec. 156; 216 S. C. 52, 56 S. E. (2d) 723; 164 S. C. 115, 161 S. E. 869; 186 S. C. 134, 195 S. E. 257; 224 S. C. 138, 77 S. E. (2d) 485; 197 S. C. 217, 14 S. E. (2d) 900; 63 S. C. 75, 40 S. E. 1028; 191 S. C. 271, 2 S. E. (2d) 36; 186 S. C. 34, 195 S. E. 116. *As to Part III, Sections 1, 2 and 3, of Act No. 644, Acts of 1954, 48 Statutes at Large 1676, and the 1960 Amendment thereto, Part II, Section 18, of Act 68 of 1960, Statutes at Large, being unconstitutional, in that they violate Article 10, Section 2, of the South Carolina Constitution of 1895:* 1 Craven (U. S.) 137, 2 L. Ed. 60; 117 Ky. 1, 77 S. W. 358, 1 L. R. A. (N. S.) 932, 111 Am. St. R. 219, 11 Am. Jur. par. 88, p. 715; 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621; 219 S. C. 485, 66 S. E. (2d) 33; 40 Words and Phrases, 606 *et seq.*; Webster's Dictionary (2d Ed.); Roget's Thesaurus (1925 Ed.) par. 639, p. 216; par. 817, p. 349; (Neb.) 69 N. W. 373, 61 Am. St. Rep. 538; 30 N. W. (2d) 548. *As to the creation of a General Reserve Fund, as provided for by Act of 1954 and the 1960 Amendment, neither contemplated nor provided for by Article 10, Section 2, and expressly prohibited:* 12 C. J.

1013; 147 S. C. 433, 145 S. E. 186; 23 S. C. 57; Cooley on Constitutional Limitations 487; 152 S. C. 455, 150 S. E. 307; 15 N. Y. 532; 12 C. F. 719; 11 S. C. 458; 193 S. C. 158, 7 S. E. (2d) 526; 195 S. C. 295, 11 S. E. (2d) 260. *As to the Act of 1954 and 1960 Amendment violating Article 10, Section 2, in that it is an obvious attempt by the General Assembly to appropriate funds beyond the current year, to appropriate funds in an undetermined amount for a general, rather than specific purpose, and to bind other and subsequent general assemblies to act to the dissipation of any and all foreseeable surplus:* 92 S. C. 81, 75 S. E. 392; 193 S. C. 158, 7 S. E. (2d) 256; 148 N. C. 220, 61 S. E. 690; 60 S. C. 532, 39 S. E. 265. *As to the Act of 1954 and 1960 amendment violating Article 10, Section 2, by attempting to appropriate in future, contingent upon existence of a surplus, an undetermined amount of money, in anticipation of non-existent needs, for a general, vague and undefined purpose:* 97 P. (2d) 1070, 126 A. L. R. 882; 4 S. C. 403; 11 S. C. 458. *As to Part III, Sections 1, 2 and 3, of Act No. 644, Acts of 1954, 48 Statutes at Large 1676, and the 1960 amendment thereto, Part III, Section 18, of Act 68 of 1960, Statutes at Large, being unconstitutional, in that they violate Article IV, Section 23, of the South Carolina Constitution of 1895:* 45 P. (2d) 955 (Ariz.); 303 Ill. 111, 134 N. E. 150, 20 A. L. R. 972; 93 Fed. (2d) 878; La. App., 170 So. 272; 23 Mont. 229, 58 P. 551; 34 Ariz. 394, 271 P. 867; 29 Nev. 469, 91 P. 819; 35 Idaho 102, 204 P. 1066; 20 Ind. 328; 55 Colo. 589, 136 P. 1033; 19 N. D. 286, 123 N. W. 884; 48 S. D. 253, 203 N. W. 462; 18 Colo. 105, 31 P. 715; 70 Ariz. 128, 216 P. (2d) 726; 72 Ariz. 318, 235 P. (2d) 1009. *As to Part III, Sections 1, 2 and 3 of Act No. 644, Acts of 1954, 48 Statutes at Large 1676, and the 1960 amendment thereto, Part II, Section 18, of Act 68 of 1960, Statutes at Large, being unconstitutional, in that they violate Article 10, Section 10, of the South Carolina Constitution of 1895:* Black's Law Dictionary (4th ed.), 1951; 353 Ill. 500, 187 N. C. 491; 17 F. (2d) 109;

8 F. (2d) 529; 194 N. C. 1, 138 S. E. 418. *As to Part III, Sections 1, 2 and 3, of Act No. 644, Acts of 1954, 48 Statutes at Large 1676, and the 1960 amendment thereto, Part II, Section 18, of Act 68 of 1960, Statutes at Large, being unconstitutional, in that they violate Article X, Section 3, of the South Carolina Constitution of 1895:* 4 S. C. 430; 11 S. C. 458; 61 S. C. 258, 39 S. E. 279; 193 S. C. 158, 7 S. E. (2d) 526; 148 N. C. 220, 61 S. E. 690; 204 S. C. 275, 28 S. E. 850; 216 S. C. 52, 56 S. E. (2d) 723. *As to allowance of attorneys' fees to Plaintiff's attorneys:* 214 S. C. 11, 51 S. E. (2d) 95, 5 A. L. R. (2d) 863; 236 N. C. 96, 72 S. E. (2d) 21; (Iowa) 56 N. W. (2d) 189; (N. J.), 83 A. (2d) 827; 333 Pac. (2d) 1058; 97 A. 837; 78 S. E. (2d) 745.

Messrs. Daniel R. McLeod, Attorney General, and James S. Verner and Julian L. Johnson, Assistant Attorneys General, of Columbia, and Sinkler, Gibbs & Simons, of Charleston, of Counsel, for Defendants, cite: As to the supreme legislative power of the State being vested in the General Assembly; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution: 216 S. C. 52, 56 S. E. (2d) 723; 1 Cooley Taxation (4th Ed.) par. 67. *As to the attempted delegation of executive powers being invalid under Article I, Section 14 of the State Constitution:* 234 S. C. 35, 106 S. E. (2d) 665; 186 S. C. 134, 196 S. E. 257; 209 S. C. 19, 39 S. E. (2d) 133. *As to the unconstitutional portion of the Act being separable from the remainder:* 151 S. C. 99, 148 S. E. 726; 216 S. C. 52, 56 S. E. (2d) 723; 214 S. C. 451, 53 S. E. (2d) 316; 13 Rich. 498; 15 Rich. 198; 209 S. C. 19, 39 S. E. (2d) 133. *As to the Act not violating any provision of Article X, or Section 24 of Article IV of the Constitution:* 4 S. C. 430; 81 C. J. S. 1215, (States, Sec. 164); (Colo.), 90 Pac. (2d) 522; 22 F. Supp. 951; 137 S. C. 288, 135 S. E. 153; 174 S. C. 422, 177 S. E. 688; 219 S. C. 485, 66 S. E. (2d) 33; 166 S. C.

58, 164 S. E. 439; 30 S. C. 579, 9 S. E. 661; 177 S. C. 399, 181 S. E. 476; 11 S. C. 458; 214 S. C. 451, 53 S. E. (2d) 316; (Okla.) 30 Pac. (2d) 700; 4 S. C. 403; 198 S. C. 225, 17 S. E. (2d) 524; 126 A. L. R. 891; 51 Am. Jur., Taxation, Par. 657; (Ill.) 134 N. E. (2d) 335; 64 N. E. (2d) 895; 198 S. C. 430, 18 S. E. (2d) 346; (Fla.) 27 So. (2d) 84; 216 S. C. 52, 56 S. E. (2d) 723; 81 C. J. S., States, 164; 165 P. (2d) 358; 375 Ill. 303, 31 N. E. (2d) 611; 94 W. Va. 255, 118 S. E. 276; 135 S. W. (2d) 687; 264 Ill. 188, 106 N. E. 266; 193 Okl. 1, 140 P. (2d) 740; 180 S. C. 329, 185 S. E. 490. *As to attorneys' fees not being allowable*: 20 C. J. S. 362, 363, Costs; 230 S. C. 269, 95 S. E. (2d) 487; 90 S. E. (2d) 635, 228 S. C. 448. *As to the taxpayer's remedy being by way of payment under protest and suit to recover*: 228 S. C. 448, 90 S. E. (2d) 635; 212 S. C. 81, 46 S. E. (2d) 653; 181 S. C. 453, 187 S. E. 921; 187 S. C. 297, 197 S. E. 317; 230 S. C. 357, 95 S. E. (2d) 628; 231 S. C. 587, 99 S. E. (2d) 377.

Messrs. E. W. Johnson, of Spartanburg, Alfred F. Burgess, of Greenville, Dorcey Lybrand, of Aiken, Hugh L. Willcox, of Florence, and Frank H. Bailey, of Charleston, for Plaintiff, in Reply, cite: As to attorneys' fees being allowable: 95 S. E. (2d) 487, 230 S. C. 269. *As to question of continuing appropriation*: 92 S. C. 81, 75 S. E. 392. *As to the State's financial stability*: (N. C.) 61 S. E. 690.

October 19, 1960.

STUKES, Chief Justice.

In this action in the original jurisdiction of the Court plaintiff attacks as unconstitutional the law providing for the creation and maintenance of a State reserve fund and for the distribution of surplus funds to the counties for public school purposes.

Sections 2 and 3 of the Permanent Provisions, Part III, of the State Appropriation Act of 1954, 48 Stat., at pages 1676, 1677, follow:

“Section 2. General Fund Reserve Account created.—There shall be established and maintained a fund which shall hereafter be carried in a special account in the State Treasury, and which shall be known and designated as ‘The General Fund Reserve.’ The maximum amount of the General Fund Reserve shall be \$3,000,000.00.

“On or before September 30, 1954, and of each year thereafter, the State Budget and Control Board shall determine the amount by which the State’s revenues, applicable thereto, exceeded the sum of (1) actual expenditures for normal maintenance and operation of the State Government for the fiscal year immediately preceding, including expenditures to political subdivisions of the State based on established percentages of revenues, but not including expenditures for highway purposes, and (2) unexpended balances of continuing appropriations made during the fiscal year immediately preceding. From such excess revenues so determined, if any, there shall be transferred to the General Fund Reserve an amount sufficient to bring the said General Fund Reserve to the sum of \$3,000,000.00, but not in excess thereof.

“The General Fund Reserve shall be used, by transfer to the State’s General Fund, as directed by the State Budget and Control Board, to cover, or apply to, any annual deficit which may occur by reason of General Fund expenditures in any year, plus other outstanding appropriation liabilities, exceeding revenues applicable thereto, and for no other purpose.

“Section 3. Budget and Control Board to make certain determinations—excess revenues to counties.—On or before September 30, 1954, and of each year thereafter, the State Budget and Control Board shall determine the amount by which the State’s revenues, applicable thereto, exceeded the sum of (1) actual expenditures for normal maintenance and operation of the State Government during the next preceding fiscal year, including expenditures to the political subdivisions of the State based on established percentages of revenues, but not including expenditures for highway pur-

poses, (2) unexpended balances of continuing appropriations outstanding at the end of the preceding fiscal year, and (3) whatever amount is found necessary to bring the General Fund Reserve to the prescribed maximum amount.

"All excess revenues so determined are hereby appropriated annually to the counties of the State, to be distributed to the respective counties in the proportion that the pupil enrollment of the public schools of a county bears to the total public school enrollment of the State, as determined by the State Superintendent of Education for the preceding school year. Such funds shall be used for General Public School purposes, including the payment of school debt, *as directed by a majority of the respective legislative delegations, including the senator.*" (Emphasis added.)

The foregoing enactment was amended by Section 14 of Act No. 333 of 1959, 51 Stat., at pages 617, 618, as follows:

"Notwithstanding the provisions of Section 2, of Part III, of Act No. 644 of the Acts of 1954, on or before September 30, 1960, the State Budget and Control Board shall determine: (1) the actual cost of operation of the State government for the preceding fiscal year; (2) any appropriation liabilities of that year which may be outstanding and unpaid at the time, and (3) any General Fund deficit which may have existed at the beginning of the said fiscal year.

"If it shall be found that the State's General Fund revenue collections for that year exceeded the total of its operating cost and the liabilities enumerated above by the amount of \$1,500,000.00, there shall be paid to the respective counties of the State for maintenance and operation of public schools, all such excess above the \$1,500,000.00 up to the sum of \$1,500,000.00 to be distributed among the counties on the basis of pupil enrollment as now used for other funds allotted for this purpose.

"Thereafter, if further excess funds remain, the General Fund Reserve shall be built up to the statutory amount, and

any remaining excess funds shall be distributed to the counties as now provided by statute."

The latter Act, of 1959, was repealed and the Act of 1954 amended by Section 18 of the Permanent Provisions of the State Appropriation Act of 1960, 51 Stat., Second Part, at page 1901, as follows:

"Notwithstanding the provisions of Section 2, of Part III of Act No. 644, Acts of 1954, the General Fund Reserve to be set aside at the end of the Fiscal Years 1959-60 and 1960-61 shall be \$5,000,000.00.

"Section 14 of Act No. 333 of the Acts of 1959, is hereby repealed."

Plaintiff's attack upon the constitutionality of the law
1 is manifold. His points will be discussed and disposed
of in the order in which they are presented in the
brief. The first is that the above emphasized provision of
the Act of 1954, which provides for the expenditure of the
funds under the direction of the respective county legislative
delegations, violates Section 14 of Article 1 of the Constitu-
tion of 1895 which requires the separation of the powers of
the several branches of the government and prohibits the
exercise of the functions of one of the departments by a mem-
ber of another department. Defendants concede the point
and that the provision of the statute objected to should be
stricken, under the authority of *Dean v. Timmerman*, 234
S. C. 35, 106 S. E. (2d) 665, and the earlier decisions there
cited. However, they assert that the Act is complete and
valid despite the deletion and is capable of enforcement with-
out it. That was the result in the *Dean case* and we think
clearly should be here. The problem was presented in *Parker*
v. Bates, 216 S. C. 52, 56 S. E. (2d) 723, and discussed
at great length. That case involved a distribution of State
surplus funds to the counties for hospital and other public
health purposes; here it is for public school purposes. The
authorities cited in that case relating to the severability of
the Act and the validity of the remainder of it after elimina-

tion of the unconstitutional portion are applicable here and need not be so soon repeated. The unimportance of the absence of a severability clause was also demonstrated in that case and need not be repeated.

There is here this further consideration which is conclusive of the legislative intention. The amendments of the law in 1959, *supra*, and in 1960, also *supra*, were after the decision of *Dean v. Timmerman*, *supra*, from which latter it was plain that the objectionable provision in the law for expenditure of the funds under the direction of the county legislative delegations was unconstitutional and invalid. The members of the General Assembly were charged with, and in this instance doubtless actually had, that knowledge and they deliberately twice reconsidered and retained the law, which is convincing that it was the legislative intent that the law should remain in force without the invalid provision. *State of Missouri v. Ross*, 299 U. S. 72, 57 S. Ct. 60, 81 L. Ed. 46.

The funds will be administered and disbursed in the
2' counties by their respective proper authorities for
"General Public School purposes, including the payment of school debt", which latter are the terms of the statute and the legislative object of the appropriation. It is presumed that the county authorities will observe the law. *Parker v. Bates*, *supra*. Plaintiff says in his brief, folio 16, that, quoting, "Some * * * might decide to use the funds for payment of teachers' salaries, some for the payment of the cost of maintaining buildings, some for new schools and some for payment of school debts." But surely all of these are "General Public School purposes" and within the terms of the statute.

In the consideration of the foregoing, and plaintiff's
3-6 other positions whereby he would have the law adjudged to be unconstitutional, there must be kept in mind these truisms which have been many times enunciated and applied: The supreme legislative power of the

State is vested in the General Assembly; the provisions of our State Constitution are not a grant but a limitation of legislative power, so that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the State or Federal Constitution; a statute will, if possible, be construed so as to render it valid; every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution. *Santee Mills et al. v. Query et al.*, 122 S. C. 158, 115 S. E. 202; *Clarke v. South Carolina Public Service Authority et al.*, 177 S. C. 427, 181 S. E. 481; *Ellerbe v. David et al.*, 193 S. C. 332, 8 S. E. 2d 518; *Pickelsimer v. Pratt et al.*, 198 S. C. 225, 17 S. E. 2d 524; *Moseley v. Welch*, 209 S. C. 19, 39 S. E. 2d 133; *Gaud v. Walker*, 214 S. C. 451, 53 S. E. 2d 316, and *Parker v. Bates*, *supra*.

Plaintiff's second point is that the law is violative of

7 Sec. 2, Art. X, of the Constitution, which follows:

"The General Assembly shall provide for an annual tax sufficient to defray the estimated expenses of the State for each year, and whenever it shall happen that the ordinary expenses of the State for any year shall exceed the income of the State for such year the General Assembly shall provide for levying a tax for the ensuing year sufficient, with other sources of income, to pay the deficiency of the preceding year together with the estimated expenses of the ensuing year."

It is contended that this provision (1) forbids the creation of a surplus (reserve fund) and (2) forbids the appropriation of a surplus to the counties, as here.

With reference to (1), the very simple answer is that the quoted constitutional provision contains no prohibition of a surplus; on the contrary, it deals with a deficit and requires the levy of taxes to meet such. It was analyzed in *Pickelsimer v. Pratt*, *supra*, 198 S. C. 225, 17 S. E. 2d 524, 528, as fol-

lows: "It is obvious that this constitutional provision is designed to prevent the General Assembly from failing to levy taxes equal in amount to the appropriations made. Unless this were done, the state's credit would be jeopardized and its ordinary governmental functions curtailed or seriously impaired." In that case, opinion by Mr. Justice Oxner, then a circuit judge, similar contention against the accumulation of a surplus was rejected. See in accord, *State ex rel. Caldwell v. Lee*, 157 Fla. 773, 27 So. 2d 84.

The occurrence of a surplus (or deficit) is fortuitous and results from the variations of the prospective estimates and the subsequent actual receipts of state revenues. It appears from the figures in defendants' brief that during the last seven fiscal years the receipts have exceeded the estimates during four years and have fallen below the estimates during three. For the fiscal year 1957-58 the receipts were over \$3,000,000 less than the estimates. In 1958-59 the receipts exceeded the estimate by almost \$5,000,000, and for 1959-60 the receipts exceeded the estimates by \$8,656,000. When the constitution was adopted the principal source of state revenue was property taxes; the assessment was known and a fixed millage would yield a certain amount. Now the state levies no property tax and depends upon income taxes, sales taxes and the like, the yields of which vary with economic conditions and are impossible to forecast with accuracy. *Lott v. Blackwood*, 166 S. C. 58, 164 S. E. 439. The inevitable result is that at the end of some fiscal years there occur deficits and in others surpluses. It would appear the part of wisdom and prudence to try to provide a cushion fund from any surplus to offset a future deficit, which is the plain legislative purpose as expressed in the act of 1954, supra, and the amount of \$5,000,000 cannot be said to be unreasonable as a matter of law in view of the total state appropriation of about \$180,000,000, exclusive of disbursements for highway purposes. The act followed the recommendation on Feb. 10, 1954, of the Governor's Tax Advisory Committee, composed of outstanding citizens and businessmen, as follows:

"If, due to a decline in general business conditions, tax revenues in this state decline and expenditures are not reduced accordingly, the state will be confronted with a serious difficulty in finding sources from which to make up the difference. Such a situation may develop in the next year or two. In any event, sound fiscal policy demands that surplus funds in the State Treasury arising from income in excess of expenditures in recent years should be earmarked to take care of budget deficits in the years ahead. Such deficits may arise sooner than we think."

Does the foregoing constitutional provision prohibit this practice? We do not think so.

Section 3 of article IX of the Constitution of 1868 was identical. It was under construction in *State v. Hayne*, 4 S. C. 403, where it was contended that the effect of it was to deny to the General Assembly the power to levy an occupational license tax. The meaning of the section was discussed at great and illuminating length and it was concluded that its purpose was to require that the ordinary expenses of the State should be met from year to year and paid from annual income and that public debt should not be created for the purpose of liquidating ordinary expenses; occupational licenses taxes are not forbidden by it. By parity of reasoning we conclude that the corresponding section of the present constitution contains no bar to a reserve fund in reasonable amount, such as is that contemplated, indeed limited, by the law before us. It undertakes "to pay the deficiency of the preceding year," the words of the constitution by, in effect, preventing the occurrence of a deficiency. The foregoing conclusion of the Court in the *Hayne* case was premised upon the consideration that the full and complete legislative power is vested in the General Assembly, including that of taxation except as limited by other provisions of the constitution; and Sec. 2 of Art. X is not a limitation. For recent reaffirmation of this rule, see *State ex rel. Roddey v. Byrnes*, 219 S. C. 485, 66 S. E. (2d) 33.

State ex rel. Branch v. Leaphart, 11 S. C. 458, was a proceeding in mandamus to require the treasurer to pay certain claims against the State. The concurring opinion of Mr. Justice Haskell, one of the majority of the court, is enlightening. It appears that an appropriation by the General Assembly for a stated object was not exhausted during the fiscal year. The remaining unexpended balance was said to be an unappropriated sum lying over to the credit of the State. It was said: "In this case the levy was made, the condition was executed in part, and it was not impossible that it may have been executed as to the whole, within the fiscal year. There are no words in the act directly or indirectly extending the operation of the act beyond the fiscal year. The court is obliged to presume that the act meant what in law it ought to mean, there being no words to the contrary. The operation of the act being thus confined to the fiscal year, the 'object' has been accomplished. So much of the money as 'may be necessary' has been or is ready to be applied to such interest demands as were settled by the adjudication of the said court of claims within the fiscal year, and the rest is an unexpended balance which reverted at the expiration of the fiscal year to furnish, with the levy and money derived from other sources of income, the fund to meet the ordinary expenses of the ensuing year, including deficiencies coming over from the last. Such is the practice, and such we think is the law made by the constitution. For instance, take the appropriation made by the fourteenth section of the same act of March 22d, 1878, page 526, 'that the sum of \$7-500 00, if so much be necessary, be, and the same is hereby appropriated to pay the salaries, clerk hire, and the expenses of the commission elected at this session of the general assembly to codify the laws, etc.' Suppose, as I believe was the case, that no commission was elected at that session. The object of the levy and of the appropriation was plainly stated, and the money could not be applied during that fiscal year to any other purpose, but was held by the state treasurer under the appropriation caption in his books. It there re-

mained until the end of the fiscal year. The object certainly was legal; indeed it is one directed by the constitution itself—article V., Section 3. But it is hard to conceive that the money thus appropriated must be (remain?) in the treasury until in some subsequent year provision may be made to revise and codify the laws, and then the money be applied. I see no real difference between that instance and the one now in hand." Likewise here the existence of a surplus at the end of the fiscal year was uncertain, made so by the variations in annual receipts from the various tax sources of the state and the inevitable differences, sometimes plus and sometimes minus, between the prior estimates and the actual yields. The General Assembly went further than in the *Leaphart case* and set aside a certain amount of the possible surplus as a reserve fund against future deficits and appropriated any additional surplus to the counties for school purposes. While it is a continuing appropriation in terms, it is subject to future legislative repeal, which is expressly recognized in plaintiff's brief, folio 170. Therefore plaintiff and others so minded may seek at the ballot box remedy for what they consider to be a wrong. Much of his argument here is, wittingly or not, concerned with legislative policy, with which the court has nothing to do. *State ex rel. Railroad Co. v. Whitesides*, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777.

We find no provision of the constitution which prohibits continuing appropriations, which are subject to repeal by any future General Assembly, as has been said. *Pickelsimer v. Pratt*, *supra*. *Briggs v. Greenville County* and *Grimball v. Beattie*, both *infra*. Plaintiff cites, as contrary, the Nebraska decisions, *State ex rel. Norfolk Beet-Sugar Co. v. Moore*, 50 Neb. 88, 69 N. W. 373, and *Rein v. Johnson*, 149 Neb. 67, 30 N. W. (2d) 548, but from them it appears that the constitution of that State contains an express prohibition of continuing appropriations, which ours does not; and our decisions have uniformly upheld them.

With reference to the reserve fund, it is not an ap-
8 propriation in the ordinary meaning of the word; it
 is to be set up and maintained from surplus funds if
the latter are in hand at the end of the fiscal year, and held
subject to meet any subsequent deficit. "The transfer to the
general fund of the unused surplus of an appropriation is
not an appropriation." 81 C. J. S. States § 164a, p. 1215.
People ex rel. Colorado State Hospital v. Armstrong, 1939,
104 Colo. 238, 90 P. (2d) 522. *Nevada-California Electric*
Corp. v. Corbett, D. C. N. D. Cal. 1938, 22 F. Supp. 951.

Turning to the appropriation to the counties for
9 school purposes, we quote the following from *Briggs*
 v. Greenville County, 137 S. C. 288, 135 S. E. 153,
156: "The power of the Legislature over the matter of ap-
propriations is plenary, except as restricted by the Consti-
tution. 36 Cyc. 891. In the absence of a constitutional pro-
hibition, the Legislature may make continuing appropri-
ations; that is, those the payment of which is to be continued
beyond the term or session of the Legislature by which they
are made." (Citations.)

To the same effect is *Grimball v. Beattie*, 174 S. C. 422,
177 S. E. 668.

An earlier decision, which is cited and relied upon by the
plaintiff here, was distinguished in the *Briggs case* as fol-
lows: "The petitioner maintains that in this state continuing
appropriations are forbidden by section 2 of article 10 of
the Constitution, as construed in *State v. State Warehouse*
Commission, 92 S. C. 81, 75 S. E. 392, where the court held
an appropriation for more than one year to be bad. That
case is easily distinguished. There the General Assembly
made an appropriation for expenditures of 1912 and 1913,
and made no provision by taxation or otherwise for meeting
the 1913 appropriation. In the present case, on the other
hand, the Legislature has appropriated a special fund, and
thereby complied with the requirement in section 2 of article
10 of the Constitution that the General Assembly shall 'pro-

vide for an annual tax sufficient to defray the estimated expenses of the state for each year.' ”

It is presently similarly distinguishable. The appropriation to the counties is contingent upon the existence of a surplus in the State treasury. If and when it exists, it corresponds to the “special fund” of the *Briggs case*. However, the legislation is not in the nature of a contract and is subject to repeal by the General Assembly. Nor does it deal with the proceeds of taxes which were levied for an object yet unaccomplished, as in the gasoline tax diversion cases of *State ex rel. Edwards v. Osborne*, 193 S. C. 158, 7 S. E. (2d) 526, and *State ex rel. Edwards v. Osborne*, 195 S. C. 295, 11 S. E. (2d) 260. The statutes there concerned deficits, here a surplus. Rather, it is parallel to the situation in *Crawford v. Johnston*, 177 S. C. 399, 181 S. E. 476, 480, where it was said: “Finally, the objection is made that the act is in conflict with section 3 of article 10 of the constitution, which provides that ‘no tax shall be levied except in pursuance of a law which shall distinctly state the object of the same; to which object the tax shall be applied.’ We are not in agreement with this view. The provisions of the statute directing that certain revenues of taxes, levied and collected under existing laws, should be used in the payment of the bonds in the first instance, are not a re-enactment, as contended by the petitioner, of the tax referred to in section 2564 of the Code. No tax is ‘levied’ by the act before us, in the sense that word is used in the quoted section of the Constitution.” See also, *State ex rel. Brown v. Bates*, 198 S. C. 430, 18 S. E. (2d) 346.

As we hold here, it is generally the law elsewhere that where a surplus remains after payment of appropriations, it may be appropriated to other purposes. 42 Am. Jur. 776, Public Funds, Sec. 80. Annotation Ann. Cas., 1917B, 867. *Parker v. Bates*, *supra*, is an example.

Plaintiff cites *Weyerhaeuser Timber Co. v. Roessler*, 1940, 2 Wash. (2d) 304, 97 P. (2d) 1070, 126 A. L. R.

882, which held that the commissioners of a county of that State were required by statute to take into account any existing surplus before fixing the tax levy for the year. It is patently irrelevant because the rather rigid statute controlled, and involved was a county, not a sovereign state. Counties, as arms of the state, are subject to control by the General Assembly. *Parker v. Bates, supra*.

Plaintiff's third point is that the above Act of 1954
10 does not conform with Section 23 of Art. IV of the constitution, which is:

"Bills appropriating money out of the Treasury shall specify the objects and purposes for which same are made, and appropriate to them respectively their several amounts in distinct items and Sections."

In the argument of this point reference is also made
11 to section 3 of Article X, "No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same; to which object the tax shall be applied." However, no tax is levied by the legislation under review. It is argued that the appropriation to the counties does not sufficiently specify the object and purpose of the appropriation; in other words, "General Public School purposes, including the payment of school debt," is insufficient. It is overlooked that the counties are but arms of the State, *Parker v. Bates, supra*, and that schools are a prime public purpose of the State. The clamor for more money for support of the schools is heard on every hand, even in the current presidential campaign. This State has long given substantial financial aid to the public schools, which are operated by counties and school districts. Something of that history is found in *Shelor v. Pace*, 151 S. C. 99, 148 S. E. 726.

In Article XI, Section 6, of the Constitution there was levied an annual poll tax, quoting, "the proceeds of which tax shall be expended for school purposes in the several school districts in which it is collected." Thus the framers of

the very constitution which plaintiff invokes themselves deemed "school purposes" a sufficiently distinct statement of the object of the tax and a sufficiently definite appropriation of the proceeds of the tax. What higher authority could be cited for the constitutionality in this respect of the presently questioned appropriation?

Under the designation "Aid to Subdivisions" very large sums of money are appropriated to the counties and municipalities by the State, all of which would appear to be invalid if this point of appellant were sustained. *Parker v. Bates, supra*; Sec. 67, Appropriation Act of 1960, 51 Stat. at pages 1875, 1876. The same observation is applicable to Sec. 68 of the Act, page 1876, "State Highway Department, for Operation, Maintenance and Construction, \$55,039,000"; to Sec. 53, page 1853, "State Forestry Commission, Item 1, Division of forestry, Operation and Maintenance, \$1,787,-880.00, Item 2, Division of State Parks, \$369,746.00"; to Sec. 48, page 1848, "Insurance Commissioner's Office, Administration, \$199,789.00; to Secs. 31, 32, 33 and 34, pages 1821-1822, State Hospital Pineland Training School, Whitten Village, and S. C. Sanatorium, all lump sum appropriations of \$7,019,220.00, \$425,339.00, \$2,138,974.00 and \$1,-148,572.00, respectively, designated "For Maintenance"; to Sec. 29, page 1819, State Department of Public Welfare, "Item 1, Administration \$1,300,000.00", to Secs. 21 and 22, page 1811, the Opportunity School and the Agency of Vocational Rehabilitation, \$164,926.00. "For Maintenance" and \$400,000.00, undesignated, respectively; to Secs. 12, 13, 14, 15, 16, 17, 18 and 19, pages 1801-1803, which are lump sum appropriations for the State educational institutions, all in large, varying amounts designated merely, "For Maintenance"; to Secs. 39, 40, 41 and 42, pages 1826, 1827, the several State Industrial Schools, all lump sums "For Maintenance"; to Item 10 of Sec. 44, Board of Health, page 1841, which is "Aid to County Health Units," \$1,111,689.00; and possibly to other appropriations which we have not enumerated.

In *Parker v. Bates*, *supra*, which is repeatedly cited herein because it is controlling of many of the issues, the appropriation to the counties was in the following language [216 S. C. 52, 56 S. E. (2d) 725]: "For use in: (a) the erection of hospitals and/or health centers and/or for matching grants by the Federal Government for the erection of hospital and/or health centers, (b) for the purpose of paying off existing bonds sold for the erection and/or equipping of hospital and/or health centers, (c) for operation of county hospitals and/or health centers, (d) for purchase of equipment and supplies for hospitals and/or health centers, (e) for hospitalization of indigent citizens, (f) for any other eleemosynary hospitals in said counties whether or not such hospital is a county or municipal owned institution, (g) or in the event any health center or hospital has been erected and/or equipped with county funds, the sums herein provided may be used as reimbursement to such county of costs of such erecting and equipping thereof." The propriety of it was not questioned by the able counsel who made vigorous constitutional attack upon other features of the act.

The title of the Act of 1954, 48 Stat. 1566, includes:
12 "To Appropriate Funds From Surplus Revenues To
A General Fund Reserve; For Additional School Aid
To Counties Of The State * * *." The appropriation sections of the act, now questioned, are set forth hereinabove.

"The requirement of itemization is to be given a common sense construction, and the statement of a single appropriate general purpose may be sufficient, although there are many items, particularly where it is difficult to determine in advance the exact amount of each of the items." 81 C. J. S. States § 164d, p. 1218.

To this point plaintiff cites *Peabody v. Russel*, 1922, 302 Ill. 111, 134 N. E. 150, 151, 20 A. L. R. 972, where the appropriation held invalid under constitutional provision similar to ours was as follows:

"To the Department of Finance:

"For reserve\$500,000.00

"To be apportioned between the executive, judicial and military departments of the state government and allotted as emergencies arise by the director of finance with the approval in writing of the Governor." Laws Ill. 1921, p. 99.

The multiplicity and uncertainty of the possible objects of the appropriation are patent and it cannot reasonably be compared with that now before us. It was pointed out by the court that the appropriation lacked certainty as to the department of state by which it would be used, and was also wanting in a statement of the purpose of the appropriation. Moreover, it sought to delegate to an administrative officer the specification of its objects. Rather, the case *sub judice* falls within *Martens v. Brady*, 1914, 264 Ill. 178, 106 N. E. 266, 271, where it was held that an appropriation "for the purpose of building and maintaining state aid roads in the several counties of the state" did not violate the foregoing constitutional provision in not specifying the amount for building roads in one item and the amount for maintaining them in another item. The court said: "The constitutional provision here invoked is one of importance and must be complied with in all appropriations to which it is applicable. Building roads and maintaining them when built are different undertakings, but both are necessary to carry out the general scheme or purpose of the act, which is to provide for better highways throughout the state."

A more recent Illinois case is to the same effect as the last cited. It is *Lund v. Horner*, 375 Ill. 303, 31 N. E. (2d) 611, 613, in which it was said: "The rule adopted in this State as to appropriations of this character, while recognizing the importance of the constitutional limitation upon appropriations, is that where the purpose for which the money is appropriated is single, as in the construction of a system of roads, the constitution does not require an itemization in detail of all expenditures of money in connection with the

general purpose for which the appropriation is made. It is pointed out that the General Assembly could not know at the time of making the required appropriation, even approximately, the amount required for each of the various contracts or purposes."

We think that the act under attack complies with Sec. 23 of Art. IV of the constitution by specifying the objects of the appropriations and making them in distinct items and sections, thereby subjecting them to separate vetoes by the Governor without affecting the validity of other appropriations contained in the act, which latter is the purpose of this feature of the constitutional provision. *Parker v. Bates, supra*. *Martens v. Brady, supra*, 264 Ill. 178, 106 N. E. 271. *Peadbody v. Russel*, 302 Ill. 111, 134 N. E. 150, 151, 20 A. L. R. 972. In the latter decisions the constitutional provision (the same as ours) is referred to as containing the "item veto power of the Governor."

Complaint is made that the appropriation of the surplus to the counties is in indefinite amount. But it is
13 as definite as it could have been made when the law was enacted. It is of all of the surplus, if any, when ascertained, after the setting aside of the fixed reserve fund. Simple arithmetic makes it definite and certain. Unchallenged figures were submitted upon oral argument of the case which show that the sum of \$7,595,617.05 is currently in hand for distribution to the counties under the terms of the law.

A strikingly similar case to that in hand and decided under a like constitutional provision is *Black v. Oklahoma Funding Bond Commission*, 193 Okl. 1, 140 P. (2d) 740, 745. The act there attacked provided for the transfer of the surplus fund of the General Reserve Fund to the State Bond Retirement Fund. In upholding the constitutionality of the Act, the Court said:

"Of the fifth ground of attack we observe that the act became law before the end of the fiscal year 1942-43 and therefore the amount of surplus which would accrue in the fund

could not be stated in a definite amount when same was passed. As to the suggestion that the act does not distinctly specify the sums appropriated, we observe that the act devotes the entire surplus, whatever it may be when capable of ascertainment, to the purposes therein specified * * *. In this act the Legislature created a special fund of this surplus which was capable of specific ascertainment by ordinary bookkeeping methods and calculations at a time previous to the time when the law should be first administered."

The following is from 81 C. J. S. States § 164b, p. 1216: "Thus, if the statute making an appropriation distinctly sets aside the whole of a special fund thereby created, and no other funds, for a designated purpose, the appropriation complies sufficiently with the constitutional requirements and is valid * * *. Even where specification of the amount is required, it is sufficient if the amount of the appropriation is ascertainable by a mathematical calculation. It is not essential or vital to an appropriation that it should be for an amount definitely ascertained prior to the appropriation; and an appropriation, the amount of which will be made certain by a mere mathematical computation, if the provisions of the act are carried into effect, sufficiently complies with this requirement."

Point IV made by plaintiff is that the Act violates section 10 of Article X of the constitution, which is:

"The Fiscal year shall commence on the First day of July in each year: Provided, That the General Assembly at its first regular session after the passage of this amendment, shall be authorized and empowered to make appropriations for governmental purposes not exceeding eighteen (18) months, and to make such other changes and provisions in law as may be necessary to effectively make the foregoing provisions operative: * * *."

This was the result of an amendment of the constitution to provide the mechanics for the change of the state's fiscal year from the calendar year to July 1—June 30. It pur-

ports to affect the powers of no General Assembly beyond that immediately succeeding the change. The clause omitted above is effective only if biennial sessions of the General Assembly be adopted, and they have not been adopted. We do not see the relevancy here and think that no discussion is needed.

Point V invokes, again, Section 3 of Article X: "No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same; to which object the tax shall be applied."

We repeat that the law under attack levies no tax. It simply deals with a surplus if and when it shall exist and, again, discussion is unnecessary.

Point VI invokes the due process of law clause of the constitution, section 5, Article I, which it is admitted in the brief is inapplicable if the preceding questions are without merit, as we have found them to be.

Point VII is a contention for attorney's fees if plaintiff should prevail in the action. Our above conclusions render any such question academic and it will not be considered.

The judgment of the court is that the law under attack is constitutional and valid with the elimination of the above emphasized portion thereof, *i. e.*, "*as directed by a majority of the respective legislative delegations, including the senator,*" which is hereby stricken. That portion only is unconstitutional and invalid; the remainder of the law is valid and effective, and injunction with respect to it is denied. The temporary restraining order heretofore issued is dissolved, and the complaint is dismissed.

TAYLOR, LEGGE, and MOSS, JJ., concur.

OXNER, J., dissents.

17705

J. Manning GOWAN, as Administrator of the Estate of Jerry GOWAN, Appellant, v. Z. L. THOMAS and his son, David Thomas, a Minor, Respondents.

(116 S. E. (2d) 761)

Action under survival statute. The Common Pleas Court, Spartanburg County, Bruce Littlejohn, J., sustained defendant's motion to strike an allegation of the complaint, and plaintiff appealed. The Supreme Court, Stukes, C. J., held that funeral expenses were not recoverable.

Affirmed.

1. DEATH.—Funeral expenses were not recoverable in an action under the survival statute. Code 1952, § 10-209.
2. APPEAL AND ERROR.—Exception which was not argued was taken to be abandoned.
3. APPEAL AND ERROR.—Statement in record for appeal from denial of funeral expenses in action under survival action, that in a prior action for wrongful death no demand for funeral expenses had been made and no testimony thereto introduced, was properly stricken. Code 1952, § 10-209.

Messrs. Johnson & Smith, of Spartanburg, for Appellant, cite: As to error on the part of the trial Judge in striking from the Complaint, as an element of damages, the claim for funeral expenses in the pain and suffering action: Mc Cormick on Damages 344; 174 N. W. 331; 26 S. E. (2d) 569, 203 S. C. 407; 103 S. E. (2d) 767; 95 S. C. 571, 38 S. E. 274; 198 S. E. 164, 188 S. C. 67; 89 P. 468; 29 S. C. 303, 7 S. E. 515; 29 S. E. 219 (100 Ga. 46), 15 Am. Jur. 511, Damages, Sec. 100; 7 A. L. R. 1334; 26 A. L. R. 599; 25 C. J. S. 525, Damages, Sec. 47 (Wis.); 222 N. W. 792; 81 So. (2d) 178; 38 So. (2d) 669; 94 N. E. (2d) 269; 268 P. (2d) 178; 65 S. E. (2d) 120; 62 A. (2d) 837; 204 S. W. (2d) 205.

Messrs. Holcombe & Bomar and Simpson Hyatt, of Spartanburg, for Respondents, cite: As to funeral expenses not being a proper element of damages in an action under the

Survival Statute: 197 S. C. 256, 15 S. E. (2d) 117; 213 S. C. 199, 48 S. E. (2d) 814; 148 S. C. 1, 145 S. E. 539; 188 S. C. 67, 198 S. E. 164; 29 S. C. 303, 7 S. E. 515; 218 S. C. 211; 7 A. L. R. 1355; 42 Okla. 784, 142 P. 1185, L. R. A. 1915B, 1141; 163 A. L. R. 253; 68 Ohio App. 426, 34 N. E. (2d) 75; 132 Conn. 461, 45 A. (2d) 789, 163 A. L. R. 247. *As to questions not argued being deemed abandoned*: 230 S. C. 39, 94 S. E. (2d) 15; 231 S. C. 378, 98 S. E. (2d) 803; 187 S. C. 50, 196 S. E. 381.

October 24, 1960.

STUKES, Chief Justice.

This appeal presents the single, sharp legal issue of whether funeral expenses are recoverable in an action under the survival statute, Section 10-209 of the Code of 1952, which follows in part:

"Causes of action for and in respect to * * * any and all injuries to the person * * * shall survive both to and against the personal or real representative * * *."

It is alleged in the complaint that plaintiff brought the action for the benefit of the estate of the deceased for the conscious pain and suffering that the deceased sustained as a result of an accident, and for the medical, funeral and other expenses and losses incurred because of the injury.

Upon defendant's motion the word "funeral" was
1 stricken from the complaint and plaintiff appeals upon an exception which asserts that, quoting "funeral expenses are a proper element of damages in a pain and suffering action", with which we do not agree.

The survival statute was analyzed in *Claussen v. Brothers*, 148 S. C. 1, 145 S. E. 539, and it was held that the causes of action made to survive under the statute are those actions which the deceased person could have brought in his lifetime against the wrongdoer for injuries by him. The simplest logic dictates that there can be no recovery for funeral expenses in an action under the survival statute because one

cannot sue and recover for his own funeral expenses. The situation is reminiscent of the old gag, "Can a man legally marry his widow's sister?"

It was squarely held in *Petrie v. Columbia and Greenville R. R. Co.*, 29 S. C. 303, 7 S. E. 515, opinion by Mr. Justice McIver, that funeral expenses of the deceased which have been paid are a proper element of damages in an action for wrongful death. Surely the wrongdoer is not doubly liable for this element of damages, and apparently appellant would have him so. See in support of our conclusion the editorial comment in 7 A. L. R. 1355.

The foregoing holding of the *Petrie case* was reiterated in *Tollerson v. Atlantic Coast Line R. R. Co.*, 188 S. C. 67, 198 S. E. 164; and also in *Gomillion v. Forsythe*, 218 S. C. 211, 62 S. E. (2d) 297, 53 A. L. R. (2d) 169.

It is generally held elsewhere, as indicated by our above decisions, that funeral expenses are not recoverable in a survival action. Upon review of the decisions which are cited it is said in an annotation in 163 A. L. R. 253, at page 260: "Medical, surgical, and hospital bills, being such expenses as might have been recovered by deceased had he survived injury, may be recovered by his representative under a survival statute. * * * Conversely, funeral expenses may not be recovered under a survival statute by the representative of a deceased, since they would not have been an element of his damages had he survived injury."

In *Hillard v. Western & S. L. Ins. Co.*, 1941, 68 Ohio App. 426, 34 N. E. (2d) 75, 76, it was said that "in such an action by the administrator the damages are limited to damages for the injuries accruing during the lifetime of the decedent and do not comprehend damages for death resulting from such injuries, or funeral expenses occasioned by such death."

We find no error in the order under appeal.

Appellant also excepted to the striking from the record for appeal the statement that in a prior action for the alleged wrongful death of the deceased, which was decided adversely to the appellant, no demand for funeral expenses was made and no testimony thereabout was introduced. Appellant has not argued the exception and we take it to be abandoned. However, it may be added that we find no merit in it.

Affirmed.

TAYLOR, OXNER, LEGGE and MOSS, JJ., concur.

17706

Ettheyln W. MALLOW, Respondent, v. Isaac Jakie WATSON and Virgil Watson, Individually and as administrators of the estate of Susan Davis Watson, Samuel Dewey Watson, J. Clyde Watson, Edith Watson and Beverly Watson Anderson, of whom Isaac Jakie Watson, Individually and as administrator of the estate of Susan Davis Watson and Samuel Dewey Watson, are Appellants.

(116 S. E. (2d) 689)

Action by owner of undivided one-half interest in lot against heirs of deceased owner of other undivided one-half interest therein for partition. The Common Pleas Court of Chesterfield County, J. Woodrow Lewis, J., entered order refusing to stay proceeding on motion of heir and granted order of reference, and administrator and heir appealed. The Supreme Court, Oxner, J., held that where owner of undivided interest in land bringing partition action had no interest in deceased's other lands which were the subject of a partition action commenced several weeks earlier by administrator and heirs of deceased, there was no reason to stay present partition action.

Affirmed.

1. ACTION.—Where owner of undivided interest in land commenced a partition action against heirs of deceased owner of the other undivided one-half interest and such heirs and administrator of de-

cedent's estate had previously commenced another partition action involving other lands owned by deceased and in which plaintiff in instant action had no interest, there was no basis on which proceeding in instant partition action should be stayed pending final determination of earlier partition proceeding.

2. **PARTITION.**—Generally it is essential that each of the parties to partition proceeding involving several parcels of land have an interest in the entire property.
3. **ACTION.**—Where plaintiff as owner of undivided one-half interest in land commenced partition proceeding against heirs of deceased owner of the other undivided one-half interest, and by virtue of an appeal by administrator of deceased owner's estate from orders refusing to stay proceeding, six months had expired since the death of decedent it would be assumed that partition decree would make proper provision to protect creditors, if any, of decedent's estate and hence there was no reason for court to stay proceedings further. Circuit Court Rules, rule 54.

Messrs. Leppard & Leppard, of Chesterfield, for Appellants, cite: As to error on part of trial judge in overruling the motion for an order staying the proceedings in this action and in granting a general order of reference in this partition action commenced prior to the expiration of six months after the death of an intestate: 49 S. C. 41, 26 S. E. 949; 106 S. C. 486, 91 S. E. 796; 210 S. C. 524, 43 S. E. (2d) 479; 214 S. C. 141, 51 S. E. (2d) 425.

Ney B. Steele, Esq., of Chesterfield, for Respondent, and Virgil Watson, individually and as administrator of the estate of Susan Davis Watson, deceased, and Beverly Watson Anderson.

October 25, 1960.

OXNER, Justice.

Susan Davis Watson died intestate on November 16, 1959, seized and possessed of several tracts of land in Chesterfield County and also an undivided half interest in a lot in the Town of Chesterfield. The remaining half interest in this lot was owned by Ethelyn W. Mallow. In due course, Isaac Jakie Watson and Virgil Watson, both of whom are among decedent's heirs at law, were appointed administra-

tors of her estate. On February 9, 1960, Isaac Jakie Watson, individually and as administrator, and Samuel Dewey Watson, another heir at law, brought an action against Virgil Watson, individually and as administrator, and the other heirs at law to partition certain real estate owned by the decedent. The record does not disclose whether it was sought in this action to include in the partition proceedings the lot in the Town of Chesterfield. Presumably this property was not included for Ethelyn W. Mallow was not made a party to that action.

On February 26, 1960 the instant action was brought by Ethelyn W. Mallow against all the heirs at law of Susan Davis Watson and administrators of her estate to partition the lot in the Town of Chesterfield. It was alleged in the complaint that the plaintiff owned an undivided half interest in said property and each of the defendants as an heir at law of Susan Davis Watson owned an undivided one-twelfth interest. It was further alleged that any claims or charges against the estate of Susan Davis Watson could be paid from the personal estate or the remaining real estate owned by decedent. On March 21, 1960 counsel for plaintiff moved for a general order of reference. On March 23rd, counsel for defendants Isaac Jakie Watson, individually and as administrator, and Samuel Dewey Watson moved to stay all proceedings in the instant action until the final determination of the partition action brought by Isaac Jakie Watson, which was then pending, and for a further order staying all proceedings until the expiration of six months from the date of the death of Susan Davis Watson. All of these motions were heard together by the Circuit Judge. Thereafter in an order filed on April 5, 1960 the Court refused the motions to stay the proceedings and granted an order of reference. From this order, Isaac Jakie Watson, individually and as administrator, and Samuel Dewey Watson have appealed.

The first question is whether the proceeding in the
1, 2 instant case should be stayed pending the final determination of the other partition proceeding com-

menced several weeks earlier by appellants. We do not think so. Respondent, Ethelyn W. Mallow, has no interest in the lands sought to be partitioned in the other action. Her only interest is in the property in the Town of Chesterfield. The general rule is that where it is sought to partition several parcels of land, it is essential that each of the parties to the proceeding have an interest in the entire property. 40 Am. Jur., page 29; 68 C. J. S. Partition § 55, page 79; Annotation 65 A. L. R. 893. As there pointed out, there is an exception if the rights of the parties are all derived from a cotenancy as a common source of title even though some of the parties are interested in only one parcel. But it does not appear from the record that respondent's half interest in the lot in the Town of Chesterfield was derived in this manner. Moreover, it is difficult to see any basis for appellants' claim to a stay of the instant action when they failed to make respondent a party to the other action.

The other question is whether the Court below should

3 have stayed further proceedings in the instant case until May 16, 1960, or six months after the death of the decedent. Appellants have obtained this stay by their appeal. The six months period has now expired. There is no claim that there have been any further proceedings after the order of reference. It will be noted that the administrators of the estate of Susan Davis Watson were made parties to this action as required by Rule 54 of the Circuit Court and it will be assumed that in the partition decree proper provision will be made to protect the creditors, if any, of decedent's estate. Apart from the foregoing, appellants are hardly in a position to claim that the instant action was prematurely commenced when they themselves brought within the six months period an action to partition the other property owned by decedent.

Affirmed.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

17707

Marilyn P. COLLINS, Respondent, v. Charles A. COLLINS, Robert Perry Collins, a minor under the age of fourteen (14) years, D. Reece Williams and J. Laurence McNeill, as Trustees for Charles A. Collins, of which Charles A. Collins is, Appellant.

(116 S. E. (2d) 839)

Divorce action. The Common Pleas Court, Kershaw County, John Grimbball, J., refused defendant's motion for change of venue, and an appeal was taken. The Supreme Court, Moss, J., held that under peculiar facts of case, wherein evidence was conclusive that an effort had been made to locate defendant in county of his alleged residence, plaintiff had right to bring action in the county of her residence.

Affirmed.

1. DIVORCE.—Quoted term, in statute permitting divorce action to be brought in county in which plaintiff resides, if, after "due diligence", defendant cannot be found, means some attempt to find party in county of his alleged residence which court or judge is satisfied is reasonable under circumstances. Code 1952, §§ 10-404, 10-438, 20-106(a, b).

See publication Words and Phrases, for other judicial constructions and definitions of "Due Diligence".

2. DIVORCE.—Under peculiar facts of case, wherein evidence was conclusive that an effort had been made to locate defendant in county of his alleged residence, plaintiff had right to bring divorce action in the county of her residence, and court properly refused defendant's motion for change of venue. Code 1952, §§ 20-101(2, 3), 20-106(a-c), 20-107.

Messrs. McEachin, Townsend & Zeigler, of Florence, for Appellant, cite: As to appellant being a resident of Horry County and entitled to be sued in the County of his residence: 175 S. E. 275 (S. C.); 92 S. E. 479 (S. C.).

Messrs. Murchison, West & Marshall, of Camden, for Respondent, cite: As to venue of instant action being properly laid in Kershaw County: 218 S. C. 235, 62 S. E. (2d) 307; 220 S. C. 38, 66 S. E. (2d) 417.

November 2, 1960.

Moss, Justice.

This is an action brought in Kershaw County by Marilyn P. Collins, the respondent herein, to procure an absolute divorce and incidental relief from her husband, Charles A. Collins, the appellant herein, on the grounds of desertion and physical cruelty. Section 20-101(2) and (3) of the 1952 Code of Laws of South Carolina. The summons was served on the appellant by publication. Section 20-107 of the 1952 Code of Laws of South Carolina.

It appears from the record that the appellant appeared in this action on March 19, 1960, and filed a notice of motion, supported by various affidavits and exhibits to change the venue of this action from Kershaw County to Horry County, under the provisions of Section 20-106(a) of the 1952 Code of Laws, upon the ground that at the time of the commencement of the action he was a resident of Horry County and not Kershaw County. The appellant duly filed an answer to the complaint, reserving all of his rights under his motion to change the venue.

The motion to change the venue was heard by the Resident Judge of the Fifth Circuit and was refused. The learned Circuit Judge refused the motion for a change of venue based upon his construction of Section 20-106 of the 1952 Code. This appeal followed. Even though the appellant has filed twelve exceptions to the order of the trial Judge and has minimized these to three questions, the only issue before this Court is whether the trial Judge committed error in refusing the motion of the appellant for a change of venue from Kershaw County to Horry County.

Venue in divorce cases is fixed by Section 20-106 of the 1952 Code, as follows:

“Actions for divorce from the bonds of matrimony shall be tried in the county (a) in which the defendant resides at the time of the commencement of the action, (b) in which

the plaintiff resides if the defendant is a nonresident or after due diligence cannot be found or (c) in which the parties last resided together as husband and wife unless the plaintiff is a nonresident in which case it must be brought in the county in which the defendant resides.”

The foregoing section was construed by the Circuit Court in the case of *Thomas v. Thomas*, 218 S. C. 235, 62 S. E. (2d) 307, 308, as follows:

“From a study of acts passed by other States governing and regulating the granting of divorce, it appears that where no specific provisions are contained therein providing for methods of process in divorce actions, normal methods of process are used which, in this State, would mean that divorce actions must be begun by the service of a Summons and Complaint upon a resident defendant in the county in which the defendant resides. However, our Legislature has seen fit to modify the normal methods of process where divorce actions are concerned to the extent that they have provided three methods of process which may be used in this State in cases involving divorce. They are as follows: (1) In cases where the defendant is a resident of South Carolina the plaintiff may bring his or her action; (a) In the county in which the defendant resides at the time of the commencement of the action; or, (b) In the county in which the parties last resided together as husband and wife; (2) In the case of a nonresident defendant, or where the defendant cannot be found after due diligence, the action may be brought in the county where the plaintiff resides.”

This Court, in an Opinion by Justice Oxner, affirming what was said by Circuit Judge T. B. Greneker, above quoted, said:

“It is my view that the case should be affirmed upon the ground and for the reasons stated in the order of Judge Greneker. * * *”

* * * There would have been no purpose in the insertion of Section 4 of the divorce statute, 46 St. at L., 216 (now

Section 20-106 of the Code), unless the Legislature intended to make special provisions in actions for divorce. * * *

It appears that the respondent and the appellant were married on September 1, 1957 and lived together as husband and wife until September 23, 1958. At the time of the separation, the appellant was a student at the University of Georgia, Athens, Georgia. The respondent left the appellant because of his abusive and ill treatment of her. She returned to the home of her mother in Kershaw County and has lived there since such separation. A child was born of the marriage after the separation. In Kershaw County the appellant was tried and convicted for failure to support his wife and child, in violation of Section 20-303 of the 1952 Code. We affirmed this conviction. *State v. Collins*, 235 S. C. 65, 110 S. E. (2d) 270. Certiorari to the United States Supreme Court was denied. 361 U. S. 895, 80 S. Ct. 199, 4 L. Ed. (2d) 152.

Prior to the indictment of the appellant in Kershaw County on a charge of nonsupport, the respondent had instituted an action for divorce and incidental relief in "The Juvenile, Domestic Relations and Special Court of Kershaw County." The appellant moved to change the venue of such action to Horry County. The judge of such court did, on September 22, 1958, dismiss said action without prejudice to the respondent "to bring an action for divorce in Horry County or to file such other actions as she may be advised." Thereafter, another action was begun by the respondent on December 23, 1958, seeking separate maintenance and support for herself and the minor child. This action was brought in the Kershaw County Court. The appellant objected to the jurisdiction and filed a motion for a change of venue. This action terminated in a voluntary nonsuit being entered.

In November, 1959, the respondent instituted an action for divorce against the appellant in the Court of Common Pleas for Horry County. It appears that on November 26, 1959, the summons, complaint and notice in said action were delivered to one Enoch Smith, a deputy sheriff of Horry

County, for service upon the appellant. It appears by affidavit of this officer, dated January 4, 1960, that he attempted to serve these papers upon Charles A. Collins personally "but was unable to locate him within the bounds of Horry County despite due diligence on my part. I also made many inquiries and was unable to locate him anywhere within the bounds of the County. I attempted, likewise, to determine his whereabouts from his parents, but was not able to find out where he was." This officer further avers that he attempted to serve the appellant by leaving a copy of the papers with his mother, Mrs. W. A. Collins, at her residence at Myrtle Beach, South Carolina, on December 12, 1959. He further states in his affidavit "I still have been unable to locate Mr. Charles A. Collins personally and I do not believe that he is presently in Horry County."

The appellant moved to set aside the service of the notice, summons and complaint in the Horry County action, on the ground that the service was ineffectual. This motion was supported by an affidavit of W. A. Collins, the father of the appellant, that he was not living in the family residence at Myrtle Beach, South Carolina, and had not been there since the papers were left. Based upon the showing made, the respondent consented to an order of dismissal of the action on the ground that the service of the summons and complaint was ineffectual. This order of dismissal was dated February 10, 1960. The present action was instituted on February 12, 1960, in Kershaw County. The motion for a change of venue in the instant case was supported by an affidavit of the appellant wherein he asserts that he has been a resident of Horry County since he was a small boy, and that he is now a student in Athens, Georgia, where he is attending the University of Georgia. He asserts that from August, 1959, that he was temporarily employed for three months in Greenville, South Carolina, and for about six weeks in Greenville, North Carolina; and that on January 5, 1960, he resumed his studies at the University of Georgia. The motion is also supported by an affidavit made by the registrar of

the University of Georgia, asserting that the appellant is registered as a nonresident student and his registration shows him to be from Myrtle Beach, South Carolina. The appellant also submits an affidavit of the minister of the First Presbyterian Church of Myrtle Beach, South Carolina, showing that he is a member of such church, and that the appellant "regularly attended the church while at his home in Myrtle Beach, and that since his going off to school and being away at work, he has regularly attended the church on his visits to his home." The appellant also asserts that there was issued to him on April 18, 1960, a registration certificate by the Board of Registration of Horry County, that shows that he is a qualified elector thereof. We point out in connection with this certificate that it was issued after the institution of this action.

The appellant contends that he is a resident of Horry 1, 2 County, South Carolina, and that this action for a divorce should be tried in such county, pursuant to Section 20-106(a) of the 1952 Code. The respondent contends that the action should be tried in Kershaw County where she resides, under Section 20-106(b) of the 1952 Code, for the reason that the appellant "after due diligence cannot be found" in Horry County.

It appears without question that the respondent, in the Horry County action, had the summons, complaint and notice delivered to the office of the Sheriff of said county for service upon the appellant, pursuant to Section 10-404 of the 1952 Code. A deputy sheriff of said county made an effort to serve such summons, complaint and notice upon the appellant but was unable to do so because he was unable to locate him within the bounds of the said Horry County, despite using due diligence so to do. He asserts that he "made many inquiries" and was unable to locate the appellant anywhere within Horry County. He avers that he tried to determine the appellant's whereabouts from his parents but was not able to do so. We think that due diligence was used by the respondent, through the deputy sheriff

of Horry County, to find the appellant within said county and to serve him with the summons, complaint and notice. Apparently, the deputy sheriff attempted to comply with Section 10-438 of the 1952 Code, by serving the mother of the appellant at her residence in Myrtle Beach, South Carolina. However, the appellant successfully moved to dismiss the action on the ground that such service was ineffectual to give the court jurisdiction of him.

The term "due diligence", as is used in Section 20-106 of the 1952 Code, means some attempt to find the party, in the county of his alleged residence, which the court or judge shall be satisfied is reasonable under the circumstances. Cf. *Bixby v. Smith*, 49 How. Prac., N. Y., 50. In the case of *Winner v. Hoyt*, 68 Wis. 278, 32 N. W. 128, it was held that a statute requiring the sheriff to make due diligence to effect the service of the process on the designated party does not require the utmost diligence to make such service, or intend that he shall do more than exercise due, appropriate, fit and proper diligence; that is, ordinary diligence. In the case of *Cone v. Ballard*, 68 S. D. 593, 5 N. W. (2d) 46, it was held that to constitute due diligence in locating a defendant, for the purpose of serving process upon him, it is not necessary that all possible or feasible means should be used, but on the contrary only all reasonable means must have been used. It was also held that continuing surveillance of the home of the defendant for fifty days following commencement of the action, and inquiry of lodgers found in the home, employees of the defendant, neighbors and other logical sources of information, constituted "due diligence" in an effort to locate the defendant in order to serve a process upon him. Since the statute, Section 20-106(b) of the Code, provides that if after due diligence the defendant cannot be found, then the respondent has the right to bring a divorce action in the county of her residence. Since the evidence in this case is conclusive that an effort was made to locate the appellant in the county of his alleged residence, and being unable to do so, we think that under the peculiar facts of

this case, that the respondent had the right to bring this action in Kershaw County, South Carolina. We likewise think that the court was correct in refusing the motion of the appellant for a change of venue.

The exceptions of the appellant are overruled and the judgment of the lower Court is affirmed.

Affirmed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, JJ., concur.

17708

Arthur W. STANLEY, Jr., by and through his Guardian *ad litem*, Theodosia K. Stanley, Arthur W. Stanley, Sr., Whitfield Sims, Beatrice Sims, Viola Samuel, Jemmon Bruce, Robert Wingate, Boyd Johnson, Catherine Johnson, as pupils of Mayo High School, and/or as electors, taxpayers, or parents of public school pupils, on behalf of themselves and as representatives of all others similarly situated, Appellants, v. Bennie A. GARY, as Supervising Principal of Mayo High School, G. C. Mangum, as Area No. 1 Superintendent of Education of Darlington County and the Darlington County Board of School Trustees, a Body Corporate, Respondents.

(116 S. E. (2d) 843)

Action by high school student, electors, taxpayers, and parents of high school pupils to enjoin principal of high school from threatening, coercing, and intimidating pupils and to enjoin school board from employing principal. The Court of Common Pleas, Darlington County, J. Woodrow Lewis, J., sustained demurrer and dismissed the complaint on the ground that plaintiffs had not exhausted the available administrative remedies, and plaintiffs appealed. The Supreme Court, Moss, J., held that where plaintiffs challenged principal's action in dismissing certain pupils for taking part in a boycott of milk being served in school lunch program, such action was a "matter of local controversy" within statute providing that county board of education shall constitute a tribunal for determining any matter of local

controversy, and that plaintiffs had failed to exhaust their administrative remedies, precluding action by courts.

Affirmed.

1. **SCHOOLS AND SCHOOL DISTRICTS.**—The maintenance of discipline and the standards of behavior in a body of students in a high school is a task committed to its faculty and officers and not to the courts, and a broad discretion is accorded the faculty and teachers, subject to supervision by the trustees of school, and the action of the trustees may be reviewed by members of county board of education, whose action, in turn, may, in a proper case, be reviewed by courts. Code 1952, §§ 21-103, 21-230 (2, 3), 21-247 to 21-247.5.
2. **SCHOOLS AND SCHOOL DISTRICTS.**—Where certain electors, taxpayers and parents of pupils attending high school sought to terminate employment of high school principal who had dismissed certain pupils for taking part in a boycott of milk being served in school lunch program, action raised only a "matter of local controversy" within statute providing that county board of education shall constitute a tribunal for determining any matter of local controversy, and plaintiffs would have to exhaust administrative remedies provided before court could entertain injunction action against the principal and county school board. Code 1952, §§ 21-103, 21-230 (2, 3), 21-247 to 21-247.5.

Elliott D. Turnage, Esq., of Darlington, for Appellants, cites: As to Plaintiffs not being required by law to first exhaust administrative procedures before commencing this action: 186 S. C. 93, 195 S. E. 122; 182 S. C. 27, 192 S. E. 671; 232 S. C. 116, 101 S. E. (2d) 185; 66 S. C. 259, 44 S. E. 784; 198 S. C. 262, 17 S. E. (2d) 530; 215 S. C. 472, 56 S. E. (2d) 243. As to complaint not containing or presenting a case of misjoinder of causes of action: 2 Hill Eq. 111; 229 S. C. 519, 93 S. E. (2d) 873; 208 S. C. 103, 37 S. E. (2d) 305; 207 S. C. 63, 34 S. E. (2d) 488; 203 S. C. 59, 26 S. E. (2d) 175; 187 S. C. 371, 197 S. E. 365; 220 S. C. 426, 68 S. E. (2d) 326; 150 S. C. 391, 148 S. E. 218; 209 S. C. 19, 39 S. E. (2d) 133; 48 S. C. 65, 25 S. E. 977; 157 S. C. 106, 154 S. E. 106. As to the order of the trial Judge being in error in denying Plaintiffs' motion for a temporary restraining order and also in dismissing the complaint: Black's Law Dictionary (1951 Ed.) 533; 12 Ga. App. 615, 77 S. E. 1080; 5 F. (2d) 188; 104 N. E. 804,

Ann. Cas. 1915A, 1171; 77 N. H. 299, 91 A. 181; 13 Mo. 543; 158 N. Y. S. 285, 172 App. Div. 46; 70 N. C. 171; 230 S. C. 498, 97 S. E. (2d) 28; 134 S. C. 373, 133 S. E. 35.

Benny R. Greer, Esq., of Darlington, for Respondents, cites: As to complaint failing to state a cause of action of any nature upon which any relief could be granted: 47 Am. Jur. 426, 427, Secs. 173, 174; 47 Am. Jur. 431, Secs. 180, 181; 229 S. C. 466, 93 S. E. (2d) 601. As to the plaintiffs having improperly joined two claimed causes of action which cannot be joined in the same complaint: (Va.) 134 S. E. 360.

November 2, 1960.

Moss, Justice.

One of the appellants in this action is a student in Mayo High School, Darlington, South Carolina. The other appellants are alleged to be electors, taxpayers, and parents of school pupils attending said Mayo High School. The respondent, Bennie A. Gary, is the Supervising Principal of said Mayo High School; the respondent, G. C. Mangum, is Area No. 1 Superintendent of Education of Darlington County; and the other respondent is the Darlington County Board of School Trustees.

It appears from the allegations of the complaint in this action that on or about March 8, 1960, some fifty pupils of Mayo High School refused to drink milk, furnished as a part of the lunchroom program menu, which was in containers bearing a certain label. It further appears that Bennie A. Gary, the Supervising Principal of said high school, assembled a meeting of the pupils of said school and "openly and menacingly threatened all of the pupils with summary expulsion from the school if they refused or continued to refuse to drink said milk." It is also alleged that on March 9, 1960, that certain of the students, including the appellant, Arthur W. Stanley, Jr., refused to drink said milk furnished as aforesaid, and that the respondent Gary singled out cer-

tain of the pupils as examples, including one of the appellants, and dismissed said pupils from said school with a note to their parents, which gave no reason for the dismissal, and offered no legal method by which the parents or the said pupils could defend themselves or effect their return to attendance in said school. It is further alleged that the parents of certain of the pupils did, on March 11, 1960, come to the school with said pupils and requested that they be re-admitted as students in said school and that the respondent Gary refused to make any charge against said pupils or to re-admit them as pupils in said school. It is then alleged that as a consequence of the arbitrary, menacing and violently threatening acts of the said Gary, that the pupils of said school have been placed in a condition of duress, tension and fear, and that because the appellants have been deprived of their rights, the said Gary is a person who has demonstrated his unfitness for the position of Supervising Principal of said school. The prayer of the complaint is that the Court enquire into the matters set forth in the complaint and that Bennie A. Gary, one of the respondents herein, be enjoined from threatening, coercing and intimidating the pupils of the said school in the manner mentioned in the said complaint, and that the other respondents be enjoined from continuing to maintain or employ the respondent Gary in the capacity of Supervising Principal of said school, or in any other capacity.

It is reasonable to conclude from the allegations of the complaint that a certain number of pupils in the Mayo High School had caused and brought about a boycott of certain milk being served in the school cafeteria. The complaint does not allege that the milk so served was impure or inferior in quality. There is no allegation of any just cause for the failure of the pupils to drink said milk.

The respondents demurred to the complaint on several grounds, among them being that the complaint fails to state a cause of action in that it shows on its face that the appellants have not exhausted available administrative procedures

by an appeal to the school trustees and to the County Board of Education. The trial Judge sustained the demurrer and dismissed the complaint on the ground that the appellants had not exhausted the available administrative procedures provided for by the Statute. Section 21-230 and Sections 21-247 through 21-247.5, 1952 Code of Laws of South Carolina. From the order sustaining the demurrer and dismissing the complaint, the appellants have duly appealed to this Court. This appeal can be disposed of by determining the question of whether the appellants were required to first exhaust administrative procedures before commencing this action. This is the first question posed by the appellants.

Under the provisions of Section 21-230, 1952 Code of Laws of South Carolina, the Board of Trustees of any school district has the power to (2) "Employ teachers from those having certificates from the State Board of Education, fix their salaries and discharge them when good and sufficient reasons for so doing present themselves, subject to the supervision of the county board of education;" and (3) "Suspend or dismiss pupils when the best interest of the schools make it necessary;".

Section 21-103 of the 1952 Code of Laws of South Carolina provides that "the county board of education shall constitute a tribunal for determining any matter of local controversy in reference to the construction or administration of the school laws, with the power to summon witnesses and take testimony, if necessary. * * *"

It is provided in Section 21-247 of the 1952 Code of Laws of South Carolina that subject to the provisions of Section 21-230 of the Code, "any parent or person standing *in loco parentis* to any child of school age, the representative of any school or any person aggrieved by any decision of the board of trustees of any school district in any matter of local controversy in reference to the construction or administration of the school laws * * * may appeal the matter in controversy to the county board of education by serving a

written petition upon the chairman of the board of trustees, the chairman of the county board of education and upon the adverse party within ten days from the date upon which a copy of the order or directive of the board of trustees was delivered to him by mail or otherwise. The petition shall be verified and shall include a statement of the facts and issues involved in the matter in controversy."

It is provided in Section 21-247.2 of the Code that the parties shall be entitled to a prompt and fair hearing by the county board of education which shall try the matter *de novo* and in accordance with its rules and regulations; and Section 21-247.3 of the Code provides that at any such hearing that the parties may appear in person or through an attorney and may submit such testimony, under oath, or other evidence as may be pertinent to the matter in controversy; and Section 21-247.4 of the Code provides that after the parties have been heard, the county board of education shall issue a written order disposing of the matter in controversy, a copy of which shall be mailed to each of the parties in interest; and it is then provided under Section 21-247.5 of the Code, that any party aggrieved by the order of the county board of education may appeal to the Court of Common Pleas of the county by serving a written verified petition upon the chairman of the county board of education and upon the adverse parties within ten days from the date upon which a copy of the order of the county board of education was mailed to the petitioner. The same section provides for a trial by the Circuit Judge *de novo* with or without reference to a master or special referee, and that the case shall be considered and disposed of as other equity cases are tried and disposed of, and all parties in interest shall have such rights and remedies, including the right of appeal, as are provided by law in such cases.

The present matter, the question of whether the respondent, Bennie A. Gary, shall be continued in his
1 employment as Supervising Principal of Mayo High School, comes within the provision of the law as being a

"matter of local controversy" to be determined by the proper school tribunals provided for by statute.

It cannot be successfully urged that the matter in controversy in this appeal is not a matter of local controversy in reference to the construction or administration of the school law. It relates directly to the administration of the school law governing the disciplining of pupils in a high school. In the conduct of the public schools, it is essential that power be vested in the supervisory officials and teachers thereof in order to maintain discipline and promote efficiency. The maintenance of discipline and the standards of behavior in a body of students in a high school is a task committed to its faculty and officers and not to the courts. In matters of discipline, a broad discretion is accorded the faculty and teachers, subject to supervision by the trustees of said school, and the action of the trustees may be reviewed by the County Board of Education, and the action of the board may, in proper cases, be reviewed by the Courts.

In *Spedden v. Board of Education*, 74 W. Va. 184, 81 S. E. 724, 725, 52 L. R. A., N. S., 163, the court said:

"The law commits the government and conduct of the school, in general, to the discretion of the board of education of the district, and places it beyond that of the patrons. Let the results be good or bad, there is no remedy, so long as the board acts within the limits of its legal power and authority. If it employs such teachers as the law authorizes it to employ, the patrons cannot interfere, by injunction or otherwise, merely because it might have found others more competent or satisfactory. The same rule applies to all other things left to its discretion. *County Ct. v. Armstrong*, 34 W. Va. 326, 12 S. E. 488; *County Ct. v. Boreman*, 34 W. Va. 87, 11 S. E. 747."

In 47 Am. Jur., Schools, Section 180, at page 431, it is said:

"It is the duty of every principal or teacher in charge of a public school to maintain discipline and good order therein,

and to require of all pupils a faithful performance of their duties. To enable such teacher or principal to discharge his duties effectually, he must necessarily have the power to enforce prompt obedience to his lawful commands. Hence, it follows that he must have the power to suspend or expel a pupil for any breach of reasonable discipline while at school, or for any misconduct injurious to the good government or morals of the other pupils, whether explicitly covered by adopted rules and regulations or not, although a teacher's action in depriving a pupil of the privileges of the school is generally subject to review by the trustees, board of education, or other governing body of the school district."

In 47 Am. Jur., Schools, Section 181, at page 431, it is said:

"Subject only to the limitation that their actions must be reasonable, or in the enforcement of reasonable rules and regulations, school authorities may suspend or expel pupils for any insubordination or misconduct subversive of the discipline of the school. * * *"

The gravamen of the complaint of the appellants is that Bennie A. Gary, the Supervising Principal of Mayo High School, has demonstrated his incompetence on account of the disciplinary action taken by him against certain pupils in said school for their refusal to drink milk bearing a certain label. There is no charge in the complaint that the milk served to the pupils of said school did not conform to the standards set forth in Item 14, Vol. 7, page 642, of the 1952 Code of Laws of South Carolina, which has to do with the wholesomeness of food and drink served in school lunch-rooms.

v~v

A "matter of local controversy" is presented when it is asserted that a duly elected teacher is unfitted to teach, or the employment of such person will result in harm to the school. In the case of *Pressley v. Nunnery, Co. Supt. of Education*, 169 S. C. 509, 169 S. E. 413, 414, it was said:

“* * * If, after the election of a teacher by a board of trustees, complaint should be made to the county board of education, by petition of patrons or other affected parties, or otherwise, that for reasons given the person employed is unfitted to teach or the employment of such person will result in harm to the school, etc., as was here alleged, it then becomes the duty of the board, under the provision of law quoted, to consider the matter, giving such hearings to the parties affected as may be proper in the circumstances, and, by express action, to indicate its approval or disapproval of the contract of employment. The election of a teacher being a ‘matter of local controversy,’ any party aggrieved may appeal, from the board’s approval or disapproval of the action of the trustees, to the state board of education. *State ex rel. Windham v. Dick*, 134 S. C. 46, 131 S. E. 772. * * *”

The general powers granted to school trustees by Section 21-230 of the 1952 Code of Laws of South Carolina, clearly permits the trustees to delegate to the principal and superintendent of a school the authority to suspend or dismiss pupils when the best interests of the schools make it necessary. Aside from this authority, a principal or superintendent has the inherent power, where the interest of the school requires it, to suspend a pupil in a proper case, unless he has been deprived of such power by the affirmative action of the Board of Trustees.

Having held that the complaint only raises a “matter of local controversy” the parent or person *in loco parentis*, or the pupil, had the right to appeal from any action of the supervising principal to the Board of Trustees, and from any action of such board to the County Board of Education, and from there to the Circuit Court, where the entire matter could be heard *de novo* by the Circuit Judge.

In the case of *Brown et al. v. County Board of Education et al.*, 186 S. C. 325, 195 S. E. 642, relief was sought by the plaintiffs by way of injunction, to restrain the defendants from the exercise of the functions of trustees of a school

district, to which they had been appointed. The County Board of Education had removed the plaintiffs as trustees of a school district because of their failure to comply with an order of such county board. This Court held that a "matter of local controversy" in reference to the construction or administration of the school laws was presented, and that for the trial of this question, the Legislature, in the laws governing public schools, had provided an appropriate remedy, with suitable tribunals and methods of procedure. It was held in the cited case that a demurrer interposed by the defendants to the complaint should have been sustained because the Court of Common Pleas was without jurisdiction of said cause and that the matter should have been determined under the statutes heretofore cited. The appellants must exhaust the administrative remedies provided by the statutes hereinbefore cited before seeking relief in the courts for their grievances.

The order of the Circuit Court sustaining a demurrer to the complain herein will have to be affirmed in the interest of orderly procedure. It was proper for the lower Court to sustain the demurrer and to refuse to entertain jurisdiction of this action before the appellants had exhausted their administrative remedies. *Pullman Co. v. Public Service Commission*, 234 S. C. 365, 108 S. E. (2d) 571. *DePass v. City of Spartanburg et al.*, 234 S. C. 198, 107 S. E. (2d) 350, 351. In the last cited case, this Court said:

"The defendants interposed demurrer to the complaint which was sustained and it was dismissed, principally upon the ground that the court of equity will not take jurisdiction of the controversy at this stage, before plaintiff has availed herself of the administrative remedies under the ordinance. With this we agree and the judgment will be affirmed.

" 'A party aggrieved by the application of an ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the courts for relief.' 62 C.J.S. Municipal Corporations § 206, p. 384. 'Courts are reluctant to interfere with administrative action prior to its

completion and in this sense not final. This reluctance has found expression in * * * the doctrine of exhaustion of administrative remedies and in a general requirement of final administrative action as a prerequisite to judicial review * * * The doctrine of exhaustion of administrative remedies requires that where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the courts will act. * * * The doctrine involves a policy of orderly procedure which favors a preliminary sifting process, particularly with respect to matters peculiarly within the competence of the administrative authority and serves to prevent attempts to swamp the courts by resort to them in the first instance. * * * The doctrine is sometimes said to rest upon the presumption that the administrative agency, if given a complete chance to pass upon the matter, will decide correctly.' 42 Am. Jur. 573, 580, 581, Public Administrative Law, Secs. 194, 197.

"Our prior decisions are generally in accord with the foregoing. For example see *American Surety Co. of New York v. Muckenfuss*, 172 S. C. 169, 173 S. E. 290; *Daniel v. Conestee Mills*, 183 S. C. 337, 191 S. E. 76; *Isgett v. Atlantic Coast Line R. Co.*, 223 S. C. 56, 74 S. E. (2d) 220; and *Dunbar v. City of Spartanburg*, 226 S. C. 360, 85 S. E. (2d) 281, 284. The last cited related to municipal zoning and concluded as follows: 'Appellant failed to first pursue the remedy provided by the Ordinance, and, having failed to do so, was not entitled to a writ of certiorari.' Here the instant plaintiff is likewise not entitled to maintain this action in equity."

For the reasons stated, we are of the opinion that the Court below properly sustained the demurrer.

Affirmed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, JJ., concur.

17709

STATE, Respondent, v. Douglas Clee THORNE, Appellant
(116 S. E. (2d) 854)

Defendant was convicted of rape of 16-year-old girl. The General Sessions Court, Greenville County, T. B. Greneker, J., entered judgment and defendant appealed. The Supreme Court, Taylor, J., held that statement by court, that every woman had right to walk upon highways and streets without fear of being robbed of something which God alone gave her and that the act was not looked upon by the law with any degree of lightness was an improper expression of opinion as to the facts and required reversal of conviction, even though court immediately thereafter stated that jury should disregard any idea which judge may have indicated about facts and defendant took stand and asked that he be executed for his crime.

Reversed and remanded.

1. CRIMINAL LAW.—In prosecution for rape of 16-year-old girl, statement by court that every woman had right to walk upon highways and streets without fear of being robbed of something which God alone gave her and that the act was not looked upon by the law with any degree of lightness was an improper expression of opinion as to the facts and required reversal of conviction even though court immediately thereafter stated that jury should disregard any idea which judge may have indicated about facts and defendant took stand and asked that he be executed for his crime. Const. art. 5, § 26.
2. CRIMINAL LAW.—A judge must be careful to avoid expressing or even intimating, any opinion as to the facts and, if he does so, whether intentionally or unintentionally, a new trial must be granted. Const. art. 5, § 26.
3. CRIMINAL LAW.—Under Constitution, jury is exclusive judge of facts, and true meaning and real object is that jury must be left to form its own judgment, unbiased by any expressions, or even intimations of opinion by the judge. Const. art. 5, § 26.
4. CRIMINAL LAW.—Proper evaluation of erroneous portion of charge to jury required that reviewing court view it in light of circumstances.

Messrs. James A. K. Rober and Harold N. Morris, of Greenville, for Appellant, cite: *As to trial Judge charging on the facts being violative of Section 26, Article 5, of the Constitution*: 28 S. C. 255, 5 S. E. 620; 113 S. C. 154, 102 S. E. 284; 51 S. C. 453, 29 S. E. 206. *As to error in charge concerning belief of witnesses*: 113 S. C. 154, 102 S. E. 284.

James R. Mann, Esq., Solicitor, of Greenville, for Respondent, cites: *As to burden on defendant to prove an affirmative defense*: 137 S. C. 256, 135 S. E. 59; 24 S. C. 459; 134 S. C. 139, 131 S. E. 420; 20 Am. Jur. 134, Sec. 132. *As to trial Judge not charging on the facts in violation of Section 26, Article 5 of the Constitution*: 47 S. C. 488, 25 S. E. 797; S. C. L. Q. Vol. 5, p. 214; 24 S. C. 505; 16 S. C. 486; 38 S. C. 1, 16 S. E. 781; 28 S. C. 250, 5 S. E. 617. *As to trial Judge not conveying an opinion of the case to the jury*: 153 S. C. 42, 150 S. E. 321; 47 S. C. 488, 25 S. E. 797. *As to there being no error in charging the jury that they had the right to believe nothing that a witness says*: 24 S. C. 109; 57 S. C. 483, 35 S. E. 729.

November 3, 1960.

TAYLOR, Justice.

Appellant was tried and convicted of the crime of rape and sentenced to be executed.

There is testimony to the effect that the alleged victim, a young girl 16 years of age, was seized by Appellant while in the business section of the City of Greenville, forced into his car and carried to an outlying area where the acts charged were allegedly committed. A further recital of the sordid facts will serve no purpose in this appeal.

After giving the usual charge, including the proposition that the trial Judge is prohibited by the Constitution from commenting on the facts, it was further stated that "if during the progress of the case your presiding judge has in any way indicated any idea which he may have about the

facts in the case such was inadvertent and unintentional and I instruct you, therefore, if such has been done to disregard it because you are entirely the judges of the facts in the case and may that always be in the trial of every case in this great State of ours."

With the foregoing we are in accord; however, immediately before instructing the jury with respect to the form of their verdict, the following language was used:

"Mr. Foreman and Gentlemen, every man the law says has the right to walk up and down the streets and highways of our State without fear of being robbed of his money. And I will tell you frankly that every woman has the right to walk upon the highways and our streets without the fear of being robbed of something which God alone gives her and when that is stolen from her she is very poor indeed. Such an act is not looked upon by the law with any degree of lightness. The facts are for you. The law is established in this State as it is written."

Art. 5, Sec. 26, Constitution of the State of South Carolina, 1895, provides:

"Judges shall not charge juries in respect to matters of fact, but shall declare the law."

In *China v. City of Sumter*, 51 S. C. 453, 29 S. E. 206, 209, this Court used the following language:

"It is contended, however, that this error was obviated by the fact that the circuit judge in several other portions of his charge told the jury that all the questions of fact were exclusively for them. But this view cannot be accepted, for if, as we have seen, the real object of this constitutional provision was to leave all questions to the jury, to be decided according to their own judgment, unbiased by any expression, or even intimations, of opinion from the judge, it is manifest that such object would be defeated if a circuit judge should be allowed to express his own opinion upon any material question of fact, and then undertake to wipe out the

impression made upon the minds of the jury by telling them that all questions of fact were for them. The impression having been once made, it would be very difficult, if not impossible, thus to obliterate it, and the result would be that the jury would be more or less influenced by an opinion coming from so high a source as an intelligent judge, whose mind had been trained to weigh testimony and determine its force and effect, and thus the very object of the constitutional provision—to preserve the minds of the jury from being in any way influenced by the opinion of the judge as to a question of fact, would be defeated. * * *

The Judge must be careful to avoid expressing, or
2, 3 even intimating, any opinion, as to the facts, and if he does so, whether intentionally or unintentionally, a new trial must be granted. Under our Constitution the jury is the exclusive judge of the facts, and the true meaning and real object is that the jury must be left to form its own judgment, unbiased by any expressions, or even intimations of opinion by the Judge. *State v. James*, 31 S. C. 218, 9 S. E. 844.

This Court held in *Norris v. Clinkscales*, 47 S. C. 488, 25 S. E. 797, and *State v. Johnson*, 85 S. C. 265, 67 S. E. 453, that a Judge violates this provision when he expresses in his charge his own opinion upon the force and effect of the testimony, or any part of it, or intimates his views of the sufficiency or insufficiency of the evidence in whole or in part.

In *State v. Smith*, 227 S. C. 400, 88 S. E. (2d) 345, 350, after quoting and citing *China v. City of Sumter*, *supra*, this Court further stated:

“It is therefore clear that while a charge must be considered as a whole, an erroneous charge will not be cured by it being stated that all questions of fact are exclusively for the jury, as the real objective of the constitutional provision against charging on the facts is to leave all questions of fact to the jury to be decided according to their own

judgment, unbiased by any expression or even intimation of any opinion from the judge."

Proper evaluation of the erroneous portion of the charge requires that we view it in the light of the circumstances; and it is impossible to say just what effect this portion of the instruction, coming so late in the charge, had upon the jury, but it must be assumed that it was not disregarded.

In instant case, defendant took the stand and asked that he be executed for his crime, but this does not alter the fact that he is entitled to a trial free from error.

We are, therefore, of the opinion that the verdict and sentence should be set aside and the case remanded to the Court of General Sessions for Greenville County for a new trial; and it is so ordered. Reversed.

STUKES, C. J., and OXNER, LEGGE and MOSS, JJ., concur.

17710

STATE, Respondent, v. Claude WILLIAMS, Appellant
(116 S. E. (2d) 858)

Prosecution for robbery, grand larceny and assault with a deadly weapon allegedly committed by defendant in grabbing arresting officer's pistol and fleeing after officer had arrested defendant for possession of illegal liquor. From a judgment of Court of General Sessions, Florence County, J. B. Pruitt, J., defendant appealed. The Supreme Court, Oxner, J., held that where evidence was in conflict as to whether or not defendant had thrown the pistol away after fleeing scene and had taken it merely to avoid arrest or whether he had taken it with the intent to steal, question of whether defendant had the felonious intent requisite to support a conviction for larceny was for jury, but where no evidence had been introduced that pistol was worth \$20.00

or more, court was in error in refusing to grant defendant's motion that charge be reduced to petit larceny.

Reversed and remanded.

1. **AUTOMOBILES.**—A highway patrolman is empowered to arrest without a warrant any person who commits a misdemeanor in his presence. Code 1952, § 46-854.
2. **AUTOMOBILES.**—A patrolman has a right to stop a motor vehicle for the purpose of requiring a driver to exhibit his license, but such right must be exercised in good faith and not as a pretext or subterfuge for an inspection of or a prying into the contents of an automobile or any other possession of a citizen. Code 1952, § 46-162.
3. **ARREST.**—Where, after policeman had stopped automobile and checked driver's operator's license and asked defendant who was riding as a passenger to step out of automobile, policeman noticed a jar of unstamped liquor sticking out from under the front seat where defendant had been riding, discovery of illegal liquor was not made pursuant to any unlawful search and policeman was justified in arresting defendant without a warrant on the belief that defendant had violated liquor law.
4. **ARREST.**—A crime is committed in the presence of an officer only when the senses of the officer afford him knowledge that the offense is being committed, but if the officer does not know it or could not observe or become cognizant of the act constituting the offense by use of his senses, offense cannot be said to have been committed in officer's presence, and in such a case officer is not authorized to arrest without a warrant.
5. **CRIMINAL LAW.**—Where evidence in prosecution for robbery, grand larceny and assault with a deadly weapon allegedly committed by defendant in grabbing the pistol of policeman who had arrested defendant for possessing, transporting and rescuing contraband liquor from the possession of a peace officer was in conflict as to whether or not jar containing liquor was visible to policeman when policeman stopped automobile in which defendant had been riding, it was error to refuse to instruct jury that an offense is not committed in the presence of an officer unless his senses afford him knowledge that the offense is being committed.
6. **LARCENY.**—Where evidence in prosecution for larceny allegedly committed when defendant grabbed pistol of police officer who had arrested him, was in conflict as to whether or not defendant had thrown the pistol away after taking it and had taken it merely to avoid arrest, or whether he had taken it with the intent to steal the pistol, question of whether defendant had felonious intent to steal was for jury.

7. **INDICTMENT AND INFORMATION.**—Where, in prosecution for larceny allegedly committed when defendant grabbed pistol of officer who had arrested him, no evidence was introduced that pistol was worth \$20.00 or more, it was error to refuse to grant defendant's motion that charge be reduced to petit larceny.

D. M. McEachin, Esq., of Florence, for Appellant, cites: As to in prosecution for grand larceny it is essential that the State prove the stolen chattel to be of a value of \$20.00 or more: 120 S. E. 239, 126 S. C. 497; 199 S. E. 303, 188 S. C. 338. As to the State not proving an intention on the part of the appellant to steal and convert to his own use the chattel in question: 1 S. E. (2d) 300. As to the jury's verdict being inconsistent: 80 A. L. R. 171; 16 S. C. L. 183; 14 S. C. L. 187. As to the State not proving a lawful arrest of appellant: 149 S. E. 348, 152 S. C. 17; 3 S. E. (2d) 198, 190 S. C. 421; 88 S. E. 441, 104 S. C. 146; 97 S. E. 62, 111 S. C. 174; 6 C. J. S. 580; 110 S. E. 123, 118 S. C. 158; 99 S. E. 753, 112 S. C. 100; 131 S. E. 767, 134 S. C. 72; 124 S. E. 648, 129 S. C. 464; 150 S. E. 682, 153 S. C. 177; 6 C. J. S. 580. As to appellant's sentence being excessive: 102 S. E. (2d) 873, 232 S. C. 489.

Richard G. Dusenbury, Esq., Solicitor, of Florence, for Respondent, cites: As to there being sufficient proof of value of article stolen to sustain conviction for crime of grand larceny: 23 S. E. (2d) 867; 3 Ga. App. 305, 59 S. E. 925.

November 7, 1960.

OXNER, Justice.

Appellant, a Negro, was charged in one indictment with robbery, grand larceny and assault with a deadly weapon, and in another indictment with possessing, transporting and rescuing contraband liquor from the possession of a peace officer. With his consent, the two cases were tried together. During the course of the trial the Court directed a verdict of not guilty upon the count charging rescuing liquor from an officer and later the solicitor *nol prossed* the other liquor charges. The case was submitted to the jury only upon the indictment first mentioned. The jury returned a verdict or

guilty of grand larceny and assault of a high and aggravated nature. A motion for a new trial was denied and appellant was sentenced to imprisonment for a term of six years on each offense, the sentences to run concurrently.

We shall first determine whether the Court below erred in refusing a motion for a directed verdict on the assault charge upon the ground that the undisputed evidence showed that the alleged assault was made while resisting an attempted unlawful arrest.

During the late afternoon of October 18, 1958, a highway patrolman stopped a Chevrolet automobile driven by appellant's brother, Daniel Williams, in a rural section of Florence County. Just before the car stopped, the patrolman noticed appellant, Claude Williams, who was sitting on the front seat with his brother, bent over "like he was putting something under the seat." The patrol car was stopped about six or eight feet behind the Williams car. Daniel got out and the patrolman asked to see his license. After inspecting same, he asked Daniel who was with him. Daniel replied that it was his brother. The patrolman, who had no warrant, then went around the right side of the Williams car and asked appellant to "step back out of the car." When appellant did so, the patrolman says he saw a jar of unstamped liquor "sticking out from under the front seat." He removed this jar and another jar of liquor found under the front seat, placed them on the left side of his car, and asked Daniel and appellant to stand between the two cars. He then got in his car and radioed a deputy sheriff. While he did so, Daniel left the place where he was asked to stand and walked toward the Williams car. As the patrolman brought Daniel back, appellant proceeded up the road on the shoulder. The patrolman overtook him and placed his hand on his shoulder. Appellant said he was not going back and jerked loose. When he had done so several times, the patrolman says he drew his gun and asked Daniel to try to get his brother not to resist. After some conversation, appellant quieted down and was brought back between the two cars and the patrolman

replaced his gun in the holster. He testified that when he got out of his car after again using the radio, appellant suddenly caught him by the arm and after a struggle took his pistol from the holster. Appellant then went down the road approximately 30 or 40 yards and stopped. Daniel picked up the two jars of liquor, carried them to his brother, and returned to his automobile where after some difficulty, he was handcuffed by the patrolman. Appellant, after getting the liquor from Daniel, ran across the field and disappeared.

Appellant testified that he knew nothing about liquor being in the car until told by his brother after seeing the patrolman behind them. He denied that one of the fruit jars was sticking out from under the front seat, stating that it was not visible. He testified that the patrolman threatened to shoot him and he then grabbed the pistol from the patrolman's hand. Appellant said after he had gone down the road a distance of about 300 yards, he threw the pistol in a field of "pea forage." It was never found. The liquor was found the next morning. Daniel was later indicted and pleaded guilty to transporting it.

Under the terms of Section 46-854 of the 1952 Code, 1, 2 highway patrolmen are required to enforce the laws of this State relative to highway traffic and motor vehicles and are given the same authority and power possessed by a deputy sheriff to enforce the criminal laws of this State. Accordingly, it has been held that a highway patrolman is empowered to arrest without a warrant any person who commits a misdemeanor in his presence. *Yongue v. National Surety Corporation*, 190 S. C. 421, 3 S. E. (2d) 198. With certain exceptions not material here, a person is required to have a driver's license to operate a motor vehicle on the highways of this State, Section 46-142, Code Supplement. Such license must be kept in his immediate possession while driving and displayed upon demand of any police officer. Section 46-162, Code Supplement. The right of a patrolman to stop a car for the purpose of requiring the driver to exhibit his license has never been questioned. Of

course, such right must be exercised "in good faith and not as a pretext or subterfuge for an inspection of or a prying into the contents of an automobile or any other possession of a citizen." *Robertson v. State*, 184 Tenn. 277, 198 S. W. (2d) 633, 635.

There is no proof here that the patrolman did not
3 act in good faith in stopping the automobile. He had a right to stop the car for the purpose of determining whether the driver had a license. Appellant's basic complaint is that after the car was stopped, he was unlawfully arrested, following which there was an unlawful search. But we think the evidence reasonably warrants a conclusion that appellant was not arrested until after the officer found the liquor. So far as appellant is concerned, the only act of the patrolman prior to that time was to request him to get out of the car. This cannot be said as a matter of law to amount to an arrest. "To constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained." *Jenkins v. United States*, 10 Cir., 161 F. (2d) 99, 101. It is not necessary "that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest; it is sufficient if the person arrested understands that he is in the power of the one arresting and submits in consequence. However, in all cases in which there is no manual touching or seizure or any resistance, the intentions of the parties to the transaction are very important; there must have been intent on the part of one of them to arrest the other, and intent on the part of such other to submit, under the belief and impression that submission was necessary. There can be no arrest where the person sought to be arrested is not conscious of any restraint of his liberty." 4 Am. Jur., Arrest, Section 2. Also, see 6 C. J. S., Arrest, § 1; Restatement, Torts, Section 112.

The patrolman testified that he did not consider that Daniel was under arrest until after the liquor was found. The

following testimony of appellant also indicates that he did not consider himself under arrest when he stepped out of the car :

"Q. What did you walk away for in the first place when the officer told you to stand there? A. I didn't walk away. I walked up the side of the car.

"Q. Why? A. He hadn't told me about an arrest or nothing."

Neither, according to the patrolman's testimony, was there a search of the car. He says that after appellant got out the liquor was plainly visible. In *Boyd v. United States*, 4 Cir., 286 F. 930, 931, Judge Woods, who served on this Court for a number of years with distinction, said: "It is not a search in any legal or colloquial sense for an officer to look into automobile standing on the roadside."

The facts in *State v. Quinn*, 111 S. C. 174, 97 S. E. 62, 63, 3 A. L. R. 1500, are similar in some respects. There an automobile occupied by five men whom the officers suspected of violating the liquor laws stopped at a railroad crossing for a passing freight train. Two rural policemen came up, one on each side of the car. They observed a quart of liquor on the back seat and another on the front seat. Both quarts were seized. They also noticed that one of the men "had something in his hands, holding it down between his legs." One of the officers "pulled it out" and found it to be a quart of whiskey. All occupants of the car were then arrested. The Court held that there was no search, "for search implies invasion and quest, and that implies some sort of force, actual or constructive, much or little." The Court said no force was used in that case because "the condition was manifest to him who had eyes to see." It was further held under the foregoing facts that no arrest was made until after the liquor was discovered, at which time the officers had a right to make an arrest without a warrant.

It is further argued that there is no proof that appellant had anything to do with the liquor and, therefore, he com-

mitted no offense in the presence of the patrolman. His counsel states in an excellent brief: "The appellant stands in the position of having been exonerated by the *nol pros* of the State of the very misdemeanor for which the State must prove that it had a lawful right to arrest him. How can the State exonerate appellant of all crime and yet convict him for resisting arrest?" But we do not understand that the right to arrest appellant without a warrant was dependent upon his being subsequently convicted. In *State v. Koil*, 103 W. Va. 19, 136 S. E. 510, 511, the Court quotes with approval the following from Cornelius on Search and Seizure, Section 28: "A crime is committed in the presence of an officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect that such is the case." Also, see *Bradley v. State*, 202 Md. 393, 96 A. (2d) 491. We think the facts here were clearly sufficient to justify the patrolman in believing that appellant was violating the liquor law.

We conclude that there was no error in refusing appellant's motion for a directed verdict on the assault charge. There is ample testimony justifying a conclusion that at the time of the alleged assault appellant was under lawful arrest which he had no right to resist. However, there remains for consideration as to this offense the exception relating to a refusal of a requested instruction by appellant.

At the conclusion of the charge, the jury was excused 4, 5 and the Court inquired of counsel if there were any suggestions as to the charge or further requests. Appellant's counsel thereupon asked that the jury be instructed to the effect that an offense is not committed in the presence of an officer unless his senses afford him knowledge that the offense is being committed. The request embodied a sound legal principle. 4 Am. Jur., Arrest, Section 29. In *State v. Pluth*, 157 Minn. 145, 195 N. W. 789, 791, the Court said: "Although a person may actually be committing

a criminal offense, it is not committed in the presence of an officer within the meaning of the statute, if the officer does not know it. And where the officer could not observe nor become cognizant of the act constituting the offense by the use of his senses it could not be committed in his presence so as to authorize an arrest without a warrant." In view of the conflicting testimony in the instant case as to whether the liquor was visible to the highway patrolman after appellant got out of the car, we think the refusal of this request constituted prejudicial error.

The next question is as to whether the Court erred
6 in refusing a motion for a directed verdict on the larceny charge upon the ground that there was no proof of an intent on the part of appellant to steal the pistol. "To make out the offense of larceny, there must be a felonious purpose. The taking must be done *animo furandi*—with a view of depriving the true owner of his property and converting it to the use of the offender." *State v. Watson*, 7 S. C. 63.

The question of whether the evidence reasonably warrants an inference of an intent to steal has given us considerable concern. Our investigation of the authorities discloses only a few cases involving a charge of robbery or larceny growing out of the forcible taking and carrying away of an officer's pistol while he was undertaking to make an arrest or otherwise acting in the discharge of his duties, and we are not sure that all of these cases can be reconciled. *Jones v. Commonwealth*, 1939, 172 Va. 615, 1 S. E. (2d) 300, cited in appellant's brief, tends to sustain the contention that there was insufficient evidence to establish the *animus furandi*. On the other hand, *Bailey v. State*, 1909, 92 Ark. 216, 122 S. W. 497, tends to support the conclusion that the question of intent should be submitted to the jury. These and other cases are reviewed in the recent cases of *Midgett v. State*, 1958, 216 Md. 26, 139 A. (2d) 209, where the Court held under facts similar in many particulars to those now presented that the question of intent should be left to the jury. Also, see *State v. Watson*, *supra*, 7 S. C. 63.

While the question is a close one, it is our conclusion that the question of felonious intent should be determined by the jury. The pistol was never found, although a search was made for it. The credibility of appellant's testimony that he threw it in the field shortly after taking it from the officer was for the jury. If after a forcible and unlawful taking, there was a subsequent felonious conversion, the offense of larceny would be complete. *State v. Davenport*, 38 S. C. 348, 17 S. E. 37; *State v. Craig*, 116 S. C. 440, 107 S. E. 926; 32 Am. Jur., Larceny, Section 40. Of course, a jury would be fully justified in concluding that there was no intent to steal the pistol but that the dominant and primary purpose of appellant was merely to disarm the patrolman, and that shortly after doing so, he discarded the pistol. Although this inference is strongly warranted by the testimony, we are not inclined to hold as a matter of law that proof of a felonious intent was wholly lacking.

We conclude that there was no error in refusing appellant's motion for a directed verdict on the larceny charge. However, the Court erred in refusing to grant his motion made at the conclusion of the evidence that the charge be reduced to petit larceny because there was no proof that the pistol was worth \$20 or more. There was no evidence produced at the trial as to its value. So much was conceded in oral argument. Appellant's contention that the evidence does not support a conviction of grand larceny is fully sustained by *State v. Bethea*, 126 S. C. 497, 120 S. E. 239.

In view of the foregoing conclusions, we find it unnecessary to pass upon appellant's exceptions relating to the inconsistency of the verdict, or upon the claim that the sentences are excessive.

Judgments reversed and sentences set aside, and the case is remanded for a new trial.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

17712

STATE, Respondent, v. Oscar Mack GIST, Appellant
(116 S. E. (2d) 856)

Defendant pleaded guilty before a magistrate on a charge of disorderly conduct by using abusive, obscene, vulgar and profane language over telephone to a female. The General Sessions Court, Union County, Bruce Littlejohn, J., affirmed the judgments and sentences of the Magistrate's Court, and defendant appealed. The Supreme Court, Taylor, J., held that the conduct in question was not encompassed within provisions of statute relating to disorderly conduct and that the Magistrate's Court was without jurisdiction to hear and pass judgment in case under statute dealing specifically with such conduct.

Judgments and sentences reversed and set aside.

1. **DISORDERLY CONDUCT.**—Use of abusive, obscene, vulgar or profane language to woman or female child over telephone was not encompassed within provisions of statute relating to disorderly conduct. Code 1952, § 16-558.
2. **OBSCENITY.**—Using abusive, obscene, vulgar and profane language in telephone call to female person was encompassed within Code section dealing specifically with such conduct; and such section, making unlawful that which was not unlawful before, was required to be followed in punishing for such conduct. Code 1952, § 16-552; Const. art. 5, § 21.
3. **CRIMINAL LAW.**—Magistrate's Court was without jurisdiction to hear and pass judgment in case where defendant was charged with making abusive, obscene, vulgar and profane telephone calls to a female. Code 1952, § 16-552; Const. art. 5, § 21.

Messrs. Matthew J. Perry, of Spartanburg, and Donald James Sampson, of Greenville, for Appellant, cite: As to the offenses charged against Appellant not constituting disorderly conduct under the laws of the State of South Carolina: 17 Am. Jur. 187; 18 C. J. 1216; 243 Minn. 196, 66 N. W. (2d) 886, 259 N. Y. 279, 181 N. E. 572, 83 A. L. R. 785; 166 N. C. 361, 81 S. E. 693; 15 Ga. App. 633, 84 S. E. 90. As to Section 16-558 of the 1952 Code being a penal statute

and must be strictly construed against the State: 216 S. C. 182, 57 S. E. (2d) 165. *As to the offenses charged against Appellant not constituting breach of the peace under the laws of the State of South Carolina:* 8 Am. Jur. 834; 195 S. C. 190, 11 S. E. (2d) 1, certiorari denied, 311 U. S. 685, 61 S. Ct. 59, 85 L. Ed. 442; 5 Q. B. 955, 114 Eng. Reprint 1508; 4 Ad. & El. 773, 111 Eng. Reprint 974; 94 W. Va. 576, 119 S. E. 682, 34 A. L. R. 570; 65 Mich. 488, 42 N. W. 997. *As to the Magistrate being without jurisdiction to receive pleas and pass sentences in instant cases:* 91 S. E. 4; 95 S. C. 203, 78 S. E. 893; 90 S. C. 166, 72 S. E. 1087; 74 S. C. 445, 54 S. E. 606; 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181; 63 S. C. 22, 40 S. E. 1017; 28 S. C. 50, 4 S. E. 810; 26 S. C. 121, 1 S. E. 437. *As to the anonymous making of obscene telephone calls not constituting disorderly conduct or breach of the peace:* 14 Am. Jur. 965; 232 N. Y. 423, 134 N. E. 332, 21 A. L. R. 1425. *As to acceptance of the pleas of guilty, by the magistrate, being improper:* 1 Mass. 95; 4 Dak. 173, 29 N. W. 7; 81 W. Va. 676, 95 S. E. 21, 6 A. L. R. 687; 110 A. L. R. 228; 338 U. S. 68, 93 L. Ed. 1815, 69 S. Ct. 357; 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801; 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A. L. R. 527. *As to denial of the due process of law:* 213 S. C. 330, 49 S. E. (2d) 289; 223 S. C. 413, 76 S. E. (2d) 291; 338 U. S. 68, 93 L. Ed. 1815, 69 S. Ct. 357; 332 U. S. 596, 68 S. Ct. 302, 92 L. Ed. 224; 338 U. S. 49, 69 S. Ct. 1347; 93 L. Ed. 1801.

Messrs. John H. Nolen, Solicitor, of Spartanburg, and Mike S. Jolly, County Solicitor for Union County, of Union, for Respondent, cite: *As to the offenses charged against appellant constituting disorderly conduct under the laws of the State of South Carolina:* 259 N. Y. 279, 181 N. E. 572, 83 A. L. R. 785; 17 Am. Jur. 187, Sec. 1; 27 C. J. S. 509, Sec. 1 (2d). *As to the offenses charged against appellant constituting breaches of the peace under the laws of the State of South Carolina:* 8 Am. Jur. 834, Sec. 3; 30 Okla. Crim. Rep. 302, 236 P. 57, 44 A. L. R. 129; 195 S. C. 190, 11

S. E. (2d) 1, certiorari denied, 311 U. S. 685, 61 S. Ct. 59, 85 L. Ed. 442; 8 Am. Jur. 837, Sec. 8. *As to the Magistrate's Court having jurisdiction*: 90 S. C. 166, 72 S. E. 1087. *As to defendant having been given a fair trial and substantial justice was done*: 148 S. E. 710, 151 S. C. 90; 230 S. C. 164, 94 S. E. (2d) 886; 98 S. C. 147, 82 S. E. 353.

November 10, 1960.

TAYLOR, Justice.

Appellant, Oscar Mack Gist, a Negro boy 16 years of age, was arrested pursuant to 66 warrants, each charging that he "did commit a breach of the peace and is guilty of disorderly conduct by placing a telephone call in the town of Jonesville, S. C. to * * * and then used abusive, obscene, vulgar, and profane language to * * *." Thereafter, he was taken before a Magistrate, where, in the presence of his parents, he plead guilty as charged in each of the warrants and was sentenced to pay a fine of \$50.00 or serve 30 days upon the public works of Union County for each of the 66 offenses. Appellant made no motion for a new trial but gave notice of intention to appeal and was released on bond.

Thereafter, the matter was argued before the Honorable Steve C. Griffith, presiding Judge of the Court of General Sessions for Union County, who duly issued an order permitting defendant to make such motion or motions as he deemed advisable under the circumstances.

Pursuant to such order, appellant appeared before the Magistrate and moved for a new trial upon all grounds appearing in the original notice of intention to appeal and upon the further ground that the acts with which appellant was charged do not amount to disorderly conduct under the Statutes of South Carolina. This motion was denied and appeal was again taken to the Court of General Sessions and heard by the Resident Judge of the Seventh Judicial Circuit, who affirmed the judgments and sentences of the Magistrate's Court. And it is from this order that appellant now appeals to this Court contending principally that the offenses

allegedly committed were not embraced within the provisions of the Statute relating to disorderly conduct and, further, that there is a specific Statute concerning the acts complained of which is beyond the Magistrate's jurisdiction.

Section 16-558, Code of Laws of South Carolina, 1952, provides:

"Any person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner (b) use obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church or (c) while under the influence or feigning to be under the influence of intoxicating liquor, without just cause or excuse, discharge any gun, pistol or other firearm while upon or within fifty yards of any public road or highway, except upon his own premises, shall be guilty of a misdemeanor."

It may readily be seen by reference to the foregoing

1 that the use of abusive, obscene, vulgar or profane language to a woman or woman child over the telephone is not encompassed within the provisions of the foregoing Section.

Section 16-552, Code of Laws of South Carolina, 1952, provides:

"Any person who shall anonymously write, print or by any other manner or means whatsoever communicate, send or deliver to any woman or woman child within this State any obscene, profane, indecent, vulgar, suggestive or immoral message shall be guilty of a misdemeanor and, upon conviction, shall be punished in the discretion of the court."

The foregoing Section, dealing specifically with the
2, 3 acts complained of and making unlawful that which was not unlawful before, must be followed, 14 Am. Jur. 765; and the penalty provided therein is that one, upon being convicted of violation of the provisions thereof, "shall be punished in the discretion of the court," whereas the ju-

risdiction of the Magistrates' Courts in criminal matters is set forth in Art. 5, Sec. 21 of the Constitution of the State of South Carolina, 1895, as being \$100.00 or 30 days. *State v. Jenkins*, 26 S. C. 121, 1 S. E. 437; *State v. Madden*, 28 S. C. 50, 4 S. E. 810; *State v. Cooler*, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181; *State v. Holcomb*, 63 S. C. 22, 40 S. E. 1017; *State v. Pinckney*, 74 S. C. 445, 54 S. E. 606; *State v. Glover*, 90 S. C. 166, 72 S. E. 1087; *Keels v. City of Sumter*, 95 S. C. 203, 78 S. E. 893; *State v. Mellette*, 106 S. C. 224, 91 S. E. 4.

It is apparent to us that the acts complained of were encompassed within the provisions of Section 16-552, Code of Laws of South Carolina, 1952, and that the Magistrate's Court was without jurisdiction to hear and pass judgment thereon. The judgments and sentences in all 66 cases are therefore reversed and set aside.

STUKES, C. J., and OXNER, LEGGE and MOSS, JJ., concur.

17711

Mattie KINARD, Respondent, v. UNITED INSURANCE COMPANY
OF AMERICA, Appellant
(116 S. E. (2d) 906)

Action by beneficiary for fraudulent and wrongful cancellation of health, accident, and life policy. From judgment of the County Court, Laurens County, Robert Gray, J., on verdict for beneficiary, insurer appealed. The Supreme Court, Stukes, C. J., held that where insurer timely requested instructions with respect to burden of proof and form of verdict if jury should find for insurer, and court failed to give such instructions, such failure was prejudicial error.

Reversed and remanded for new trial.

1. INSURANCE.—In action by beneficiary for fraudulent and wrongful cancellation of a health, accident and life policy, questions whether insured was totally and permanently disabled when insurer canceled

the policy, and whether insurer willfully and fraudulently breached a long-established custom of calling at home of insured for collection of the premiums, were for jury.

2. PLEADING.—Allegations in complaint by beneficiary for fraudulent and wrongful cancellation of health, accident and life policy, as to alleged wrongful and fraudulent breach of contract and deliberate acts of fraud, cheating and wrongdoing, were descriptive of the alleged fraudulent acts which accompanied alleged breach of contract, and were not subject to motion to strike.
3. PLEADING.—In action by beneficiary for fraudulent and wrongful cancellation of a health, accident and life policy, court properly refused motion to strike “all allegations pertaining to the benefit under the contract”, since the permanent and total disability benefit was relevant to insurer’s claim of lapse for nonpayment of premiums, and death benefit was pertinent to the measure of actual damages.
4. INSURANCE.—Fact that insured’s physician or his secretary, who filled insurance forms with respect to waiver of premium for permanent and total disability resulting from hypertension, vascular disease, entered seven days as answer to question of how long patient would be confined to bed, did not estop insured from claiming that he was entitled to benefits based upon permanent and total disability on theory that insured had accepted payment and filed claims for temporary disability benefits, where insured was permanently and totally disabled, and it was physician’s understanding that each claim was for a specific weekly period, and should cover that period of time.
5. INSURANCE.—Where health, accident and life policy did not contain reservation to insured of right to change beneficiary, and where, in addition, insured was deceased, beneficiary had standing to show fraudulent and wrongful cancellation of a policy, and thereby show a fraudulent breach of contract as to beneficiary.
6. APPEAL AND ERROR—TRIAL.—In action by beneficiary for fraudulent and wrongful cancellation of health and accident and life policy, where insurer timely requested instructions with respect to burden of proof and form of verdict if jury should find for insurer, and court failed to give such instructions, such failure was prejudicial error. Code 1952, § 10-1210.

Messrs. Watkins, Vandiver, Freeman & Kirven, of Anderson, for Appellant, cite: As to error on part of trial Judge in allowing plaintiff to proceed on two or more inconsistent theories of law: 169 S. E. 430, 169 S. C. 540; 77 S. E. (2d) 267, 224 S. C. 1; 91 S. E. (2d) 709, 229 S. C. 54; 77 S. E. (2d) 215, 223 S. C. 493; 105 S. C. 25, 89 S. E. 467;

71 S. E. 818, 89 S. C. 420; 89 S. E. (2d) 97, 228 S. C. 144; 200 S. C. 84, 20 S. E. (2d) 640; 24 S. E. (2d) 369. *As to the plaintiff beneficiary being estopped from ascertaining a claim that the deceased insured was entitled to benefits based upon a permanent and total disability for a period of time during which the insured had filed claims for, and accepted payments of temporary disability benefits from defendant:* 45 C. J. S., Insurance, Sec. 473(5); 192 S. E. 571, 184 S. C. 341. *As to the evidence not establishing a prima facie case of fraudulent breach of contract as to this plaintiff:* 1 C. J. S., Actions, Sec. 44, *et seq.*; C. J. S., Contracts, Sec. 390; 1 Speers 43, 28 S. C. L. 18; 201 S. C. 166, 21 S. E. (2d) 576; 67 S. C. 122, 45 S. E. 135. *As to error on part of trial Judge in incorrectly charging as to measure of damages, and charging on the facts:* 18 S. C. 108.

Messrs. Justin A. Bridges and Eston W. Page, of Laurens, for Respondent, cite: As to trial Judge properly allowing case to be tried on Plaintiff's theory thereof: 193 S. E. 46, 84 S. C. 485, 32 C. J. 1263, Sec. 461; 32 C. J. 1264, 1265, Sec. 464; 170 S. C. 80, 169 S. E. 676, 45 C. J. S. 465 (b); 48 A. L. R. 107, 109; 107 A. L. R. 1233, 1235; 189 S. C. 108, 200 S. E. 102; 232 S. C. 433, 102 S. E. (2d) 743. *As to the purpose of a provision waiving premiums upon the occurrence of the disability being to waive payments of premiums which the insured and the insurer contemplated that the insured would be likely unable to pay on account of sickness or other disability:* 15 Appleman on Insurance Law and Practice, 8306; 136 S. E. 304-306. *As to the evidence establishing a prima facie case of fraudulent breach of contract as to this plaintiff:* 161 S. E. 473, 163 S. C. 191; 15 Appleman on Insurance Law and Practice 8313, 8314, 8315; 23 Am. Jur. 854, 855, 857, 858; 227 S. C. 239; 184 S. C. 383; 223 S. C. 407. *As to trial Judge properly charging the law of the case:* 232 S. C. 489; 108 S. E. (2d) 777; 227 S. C. 81; 229 S. C. 403.

November 9, 1960.

STUKES, Chief Justice.

This is an appeal from a judgment on an insurance policy. It was tried as an action for fraudulent breach of contract accompanied by a fraudulent act, and resulted in verdict for plaintiff for \$200.00 actual damages and \$1,300.00 punitive damages.

The complaint alleged the issuance to plaintiff's husband on October 13, 1947 of the policy which provided life insurance of \$200.00, with plaintiff as beneficiary, and a weekly sick or accident benefit of \$10.00, with further provision for waiver of premiums, on certain conditions, for permanent and total disability. In 1953 the plaintiff became so disabled and gave repeated notices thereof to defendant which nevertheless continued to demand payment of premiums until September 1957 when, without warning or notice, it violated its established custom of calling at the home of the insured to collect the premiums; the insured died on January 11, 1958; plaintiff as beneficiary filed proof thereof but defendant refused payment of the death benefit and informed plaintiff that the policy had been cancelled in September 1957; the cancellation was fraudulent and with knowledge of the physical condition of the insured which entitled him to waiver of the premiums; defendant's agent acted fraudulently and with intent to cheat by (1) continuing to demand and collect premiums for four years with the foregoing knowledge, (2) willfully refusing to waive the premiums as provided by the policy, (3) in following for eleven years the custom of collecting the premiums at the home of the insured, who was a completely illiterate person, and then breaking the custom without notice or warning and thereafter cancelling the policy in order to defraud the plaintiff, who was the death beneficiary, and (4) collecting the premiums until it became apparent from the claims filed and from the agent's observation that the insured was near death, then breaking the custom of collecting in order to cancel the policy and avoid payment of

the death claim. The concluding paragraph of the complaint is that by reason of the wrongful and fraudulent breach of the contract and deliberate acts of fraud, cheating and wrongdoing, the plaintiff has been damaged, etc.

The defendant answered by way of general denial, admitted that it had paid claims for disability under the policy but alleged that it was cancelled in 1957 upon the insured's failure and refusal to continue to pay the premiums.

The transcript of record was settled by the trial judge, from which there was no appeal. In the statement it is recited that upon motion of defendant to require the plaintiff to elect between inconsistent causes of action, plaintiff stated her position to be that the complaint stated only one cause of action, to wit, wrongful and fraudulent cancellation of the policy, constituting a breach of contract, accompanied by a fraudulent act. Defendant then moved to strike from the complaint allegations pertaining to fraud and deceit and allegations pertaining to benefits under the contract. Plaintiff's counsel stated that it was not his contention that the policy was in force at the time of the death of the insured but that it was in force at the time of the cancellation in 1957. Whereupon the court denied defendant's motion and the case proceeded to trial.

Contrary to the foregoing statement, defendant's first
1 point on appeal is that plaintiff was allowed to proceed on two or more inconsistent theories of law. This is negated by the above statement and needs little or no discussion. The case was tried upon the theory of fraudulent breach of contract, accompanied by fraudulent act or acts, and the evidence, of which a minimal amount will be stated, because of the necessity for new trial, tended to establish the cause of action. It may be added that the medical and other testimony supported the conclusion that the insured was totally and permanently disabled when defendant cancelled the policy; but that was, and will be on new trial, a question for the jury. The latter observation is also appli-

cable to plaintiff's claim of willful and fraudulent breach of the long established custom of calling at the home of the insured for collection of the premiums. *Simmons v. Service Life & Health Ins. Co.*, 223 S. C. 407, 76 S. E. (2d) 288; *Hutcherson v. Pilgrim Health & Life Ins. Co.*, 227 S. C. 239, 87 S. E. (2d) 685. The plaintiff is illiterate, as was the insured.

Under this first point appellant also argues error on
2 the part of the court in denying motion to strike allegations of the complaint which it is contended were pertinent only to an action for fraud and deceit, for which there are cited *Mikell v. McCrery-Pressley Co.*, 105 S. C. 25, 89 S. E. 467; *Lawson v. Metropolitan Life Ins. Co.*, 169 S. C. 540, 169 S. E. 430; *Collopy v. Citizens Bank of Darlington*, 223 S. C. 493, 77 S. E. (2d) 215; and *Blackman v. Independent L. & A. Ins. Co.*, 229 S. C. 54, 91 S. E. (2d) 709. However, we find none of them applicable to the case and complaint at hand. Rather, the complaint is within *Green v. Industrial Life & H. Ins. Co.*, 199 S. C. 262, 18 S. E. (2d) 873, 876, where the motives and acts were described as "wicked," "unlawful," "cheating," "fraudulent," etc., and we said and held: "These allegations may be regarded as bearing on the issue as to whether such breach was accompanied by fraudulent acts." And so here, they are taken to be descriptive of the alleged fraudulent acts which accompanied the alleged breach of contract.

The motion did not specify the portions of the complaint which appellant would strike, which was hardly a proper way to present it. In the brief on appeal they are specified. Upon consideration of them in their context we think, as above indicated, that they are relevant to the fraudulent acts alleged to have accompanied the breach of the policy contract in 1957 by the cancellation of it.

Appellant also moved to strike, quoting, "all allegations pertaining to the benefit under the contract."
3

But the permanent and total disability benefit was

relevant to appellant's claim of lapse for nonpayment of premiums; and the death benefit was pertinent on the measure of damages to respondent. Incidentally, the jury followed it exactly in their verdict for actual damages.

There was no error in the refusal of the motions to strike.

The second point of the defendant, now appellant, is that the plaintiff, now respondent, is estopped from claiming that the insured was entitled in his lifetime to benefits based upon permanent and total disability during the period when he filed claims, and accepted payment, for temporary disability benefits.

The policy provides: "Weekly sick benefit * * * \$10.00 * * * benefits will be paid for sickness * * * from any cause * * *." And under "Free Insurance" in red capital letters, appears the following provision:

"Paragraph 15. If the insured, while this Policy is in full force and effect, and after attaining fifteen (15) years of age, according to our records, shall furnish proof satisfactory to the Company that he or she has become wholly and permanently disabled by either sickness or accident from causes originating and beginning after this Policy has been in force two (2) full years, and will be permanently, continuously and wholly prevented thereby for life from performing any kind of work for compensation or profit, and that such disability has then existed for a period of not less than ninety (90) days, then the Company will, by endorsement hereon, waive payment of premiums during such disability and the benefits under this Policy shall be the same as though premiums had been paid in cash. The Company reserves the right of having the Insured examined and re-examined at any time by a physician of its own selection to determine the existence or continuance of such disability."

In evidence as exhibits were several claims upon
4 which the insured had been paid benefits for disability. The printed form was that of the insurer. The insured's physician or his secretary, he said, filled them. The

diagnosis given was "hypertension, vascular disease", and disability was stated to be total. There was a printed question, "If so (confined to bed) how long from this date will patient be so confined?" It was answered, "seven days". It is contended by appellant that this indicated temporary rather than permanent disability. In his testimony the physician explained that it was his understanding that each claim was for a specific weekly period and that it should cover that period of time. It is common knowledge that hypertension, vascular disease, is rarely, if ever, a temporary condition. The physician testified, in effect, that in his opinion the insured was, during all of the period of treatment by him, permanently and totally disabled.

Upon this second point of the appeal there is cited only *Baker v. Metropolitan Ins. Co.*, 184 S. C. 341, 192 S. E. 571, 134 A. L. R. 205. We do not think that authority requires, under the facts of this case, the conclusion that an estoppel arose, as a matter of law, by reason of the contents of the physician's certificates on the insured's claims for disability. The point is overruled.

Appellant's third point challenges the sufficiency of the evidence to establish a case of fraudulent breach of contract *as to the respondent*. This contention is concluded against appellant by *Babb v. Paul Revere Life Ins. Co.*, 224 S. C. 1, 77 S. E. (2d) 267 (both opinions), and the authorities there cited. The insured being dead, it is unnecessary to determine whether respondent's interest in the policy as beneficiary was, during the lifetime of the insured, vested or contingent. See *Shuler v. Equitable Life Assurance Society*, 184 S. C. 485, 193 S. E. 46. However, it is noted that although on the back of the policy is a blank printed form for change of beneficiary, the policy does not contain reservation to the insured of the right to change the beneficiary.

Finally, the appellant imputes error in the instructions to the jury. This ground of appeal will have to be sustained and the case reversed for new trial.

After the charge and after the jury had retired, the defendant excepted to the charge in accord with section 10-1210 of the Supplement to the Code of 1952. The exceptions are without merit in view of what has been said concerning appellant's other points, except that relating to the request that the court instruct the jury with respect to the burden of proof and the form of verdict if they should find for the defendant, both of which the court had overlooked in its charge. It appears from the record that appellant's timely request for these further instructions was ignored by the court. That appellant was entitled to them is too elementary to need discussion or citation of authority.

There were other exceptions to the charge but no prejudice appears and it may not be repeated upon re-trial in the particulars now complained of. Therefore, they will not be considered.

The foregoing opinion has followed appellant's brief in its presentation of the points on appeal. Implicit in the discussion is the conclusion that the trial court did not err in overruling appellant's motions for nonsuit and for directed verdict, although imputations of error in such are not expressly included in the points presented.

Reversed and remanded for new trial.

TAYLOR, OXNER, LEGGE and MOSS, JJ., concur.

17713

Isaac Jakie WATSON, Individually and as administrator of the estate of Susan Davis Watson, and Samuel Dewey Watson, Appellants, v. Virgil WATSON, individually and as administrator of the estate of Susan Davis Watson, J. Clyde Watson, Edith Watson and Beverly Watson Anderson, Respondents.

(117 S. E. (2d) 145)

Action was brought for partition in kind of realty of deceased. The parties were the administrators and all of the surviving heirs at law, distributees, and next of kin of

the deceased. One of the heirs filed a counterclaim to recover for services allegedly rendered the deceased during her lifetime by that heir. The Common Pleas Court of Chesterfield County, J. Woodrow Lewis, J., rendered an order denying motion to strike the counterclaim, and one of the administrators and one of the heirs appealed. The Supreme Court, Taylor, J., held that the counterclaim could not be filed for services allegedly rendered the deceased.

Order reversed, and demurrer to counterclaim sustained.

PARTITION.—In action for partition in kind of realty of deceased, wherein administrators and all surviving heirs at law, distributees, and next of kin of deceased were parties, one of the heirs could not file a counterclaim to recover for services allegedly rendered the deceased during her lifetime by that heir. Code 1952, § 10-703.

Messrs. Leppard & Leppard, of Chesterfield, for *Appellants*.

H. F. Bell, Esq., of Chesterfield, for the *Respondent*, *Edith Watson*, cites: *As to right of Respondent to counterclaim in instant action*: 199 S. C. 203, 18 S. E. (2d) 736.

November 14, 1960.

TAYLOR, Justice.

The complaint in this appeal alleges a cause of action for partition in kind of the estate lands of Susan Davis Watson, the plaintiffs and the defendants being the administrators and all of the sole surviving heirs at law, distributees and next of kin of the said Susan Davis Watson.

The answers of the defendants, J. Clyde Watson, Virgil Watson and Beverly Watson Anderson seek to have a portion of the estate property partitioned in kind and a portion sold at public auction and the proceeds divided among the parties.

The answer of defendant, Edith Watson, after settling forth that a portion of the estate property should be partitioned in kind and a portion sold at public sale and the proceeds of the sale divided among the parties, contained a

counterclaim or cross action for services rendered the deceased, Susan Davis Watson, during her lifetime.

Plaintiffs by way of reply filed demurrer to the counterclaim, the pertinent parts being:

"1. That the counterclaim contained in the answer of the defendant, Edith Watson, does not exist in favor of the defendant, Edith Watson, against the plaintiffs between whom a several judgment might be had in this action.

"2. That the counterclaim contained in the answer of the defendant, Edith Watson, did not arise out of the contract or transaction set forth in the complaint as a foundation of plaintiffs' claim or connected with the subject of the action.

"3. That it appears on the face of the complaint and the answer of the defendant, Edith Watson, to permit the alleged counterclaim and cross complaint of the defendant, Edith Watson, would be permitting the improper uniting of several causes of action.

"4. That the counterclaim contained in the answer of the defendant, Edith Watson, does not state facts sufficient to constitute a cause of action for the reason that Section 19-554 of the Code of Laws of South Carolina, 1952, provides that no action shall be commenced against any executor or administrator for the recovery of the debts due by the testator or intestate until six months after said testator's or intestate's death, and upon the further ground that the said counterclaim does not allege that the defendant, Edith Watson, has filed and proved the alleged claim in said counterclaim in accordance with Sections 19-473 and 19-474 of the Code of Laws of South Carolina, 1952, and upon the further ground that the alleged claim of the defendant, Edith Watson, in said counterclaim, has not been passed upon by the duly qualified executors of the Estate of Susan Davis Watson and that the time for the ascertainment of the debts of the estate has not expired in accordance with Section 19-473 of the Code of Laws of South Carolina, 1952.

"5. That the Court does not have jurisdiction of the subject of the action alleged in the counterclaim contained in

the answer of the defendant, Edith Watson, for the reason that Section 19-554 of the Code of Laws of South Carolina, 1952, provides that no action shall be commenced against any executor or administrator for the recovery of the debt due by the testator or intestate until six months after said testator's or intestate's death, and upon the further ground that the said counterclaim does not allege that the defendant, Edith Watson, has filed and proven the alleged claim in said counterclaim in accordance with Sections 19-473 and 19-474 of the Code of Laws of South Carolina, 1952, and upon the further ground that the alleged claim of the defendant, Edith Watson, in said counterclaim, has not been passed upon by the duly qualified executors of the estate of Susan Davis Watson and that the time for the ascertainment of the debts of the estate has not expired in accordance with Section 19-473 of the Code of Laws of South Carolina, 1952.

"6. That there is a defect of parties as appears upon the face of the counterclaim in the answer of the defendant, Edith Watson, in that the subject of the alleged counterclaim of the defendant, Edith Watson, is a claim for services rendered for Susan Davis Watson and therefore is only maintainable against the personal representatives of the estate of Susan Davis Watson and is not maintainable against the individual heirs of the estate of Susan Davis Watson."

Motion was also made to strike the counterclaim and this motion was refused by the Hearing Judge.

Section 10-703, Code of Laws of South Carolina, 1952, provides:

"The counterclaim mentioned in § 10-652 must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action and arising out of one of the following causes of action:

"(1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action; or

“(2) In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action.”

The counterclaim under consideration does not fall within the provisions of the foregoing section of the Code and may not, therefore, be filed by one of the heirs for services rendered the decedent in a partition action.

The further question of whether or not the counterclaim was prematurely filed in violation of the provisions of Sec. 19-554, Code of Laws of South Carolina, 1952, which provides that no action shall be commenced against any executor or administrator for the recovery of the debts due by the testator or intestate until six months after such testator's or intestate's death is now moot in that six months have expired.

For the foregoing reasons, we are of opinion that the Order appealed from must be reversed and the demurrer sustained; and it is so ordered. Reversed.

STUKES, C. J., and OXNER, LEGGE and MOSS, JJ., concur.

17714

STATE, Respondent, v. W. H. GRAHAM and James Holland,
Appellants

(117 S. E. (2d) 147)

Hotel owner and his employee were convicted of willfully and feloniously setting fire to hotel with intent to defraud insurance companies. The General Sessions Court, Florence County, T. B. Grenaker, J., rendered judgment, and defendants appealed. The Supreme Court, Oxner, J., held that refusal of motions for directed verdict made at conclusion of state's case and conclusion of all testimony was not error, and that where it appeared that there had been definite odor of some petroleum product when firemen arrived, admission of cap from oil can found in room in which

there had been no fire and pair of gloves which was similar to those worn at times by employee and which had an oily smell was proper, but weight to be given evidence was for jury.

Affirmed.

1. ARSON.—In prosecution of hotel owner and his employee for willfully and feloniously setting fire to hotel with intent to injure and defraud insurance companies, question of defendants' guilt was for jury.
2. ARSON.—In prosecution of hotel owner and his employee for willfully and feloniously setting fire to hotel with intent to defraud insurance companies, sufficiency of explanation of hotel owner with respect to delay in giving fire alarm that for some time prior to fire sprinkler system had not been functioning properly and on several occasions rang for several minutes when there was no fire was for jury.
3. CRIMINAL LAW.—Function of court in passing on motion for directed verdict in prosecution for willfully setting fire to building with intent to defraud insurance companies was not to determine whether defendants were guilty, but solely to determine whether evidence was sufficient to require submission of case to jury, and court was empowered to set aside verdict if it felt there had been a miscarriage of justice.
4. CRIMINAL LAW.—Statements made by hotel employee, accused of setting fire to hotel, as to his whereabouts when the fire occurred and as to when he had last been on floor where 11 or 12 fires had been started were not "confessions", and court did not err in admitting such statements although no instructions as to law of confessions were given.
5. CRIMINAL LAW.—In prosecution of hotel owner and his employee for willfully and feloniously setting fire to hotel with intent to defraud insurance companies, wherein it appeared that there had been a definite odor of some petroleum product when firemen arrived, admission of cap from oil can found in room in which there had been no fire and pair of gloves which was similar to those worn at times by employee and which had an oily smell was proper, but weight of evidence was for jury.
6. CRIMINAL LAW.—In prosecution of hotel owner and his employee for willfully and feloniously setting fire to hotel with intent to defraud insurance companies, wherein hotel owner had testified that on several occasions bell connected with sprinkler system had given a false alarm, permitting hotel owner to be asked whether fire department had previously been called to hotel was not prejudi-

cial on ground that state was permitted to attack reputation of hotel owner.

7. CRIMINAL LAW.—In prosecution of hotel owner for setting fire to hotel with intent to defraud insurance companies, testimony of policeman that he had known hotel owner's wife for a number of years and that she had come to work at hotel before she and hotel owner were married was not objectionable as an attack on reputation of hotel owner.
8. CRIMINAL LAW.—Where hotel owner and his employee, who were charged with setting fire to hotel with intent to defraud insurance companies, alleged that, after the fire and continuing up to trial, newspaper accounts or statements made over television and radio created an impression that defendants were guilty and strongly prejudiced them throughout the county, but, to controvert that showing, the state offered testimony and affidavits to effect that there was no prejudice against defendants and that a fair and impartial trial could be had in county in which it was had, refusal to change venue was not an abuse of discretion.
9. CRIMINAL LAW.—A motion for change of venue on ground that an impartial jury cannot be obtained is addressed to discretion of court, and discretion is a judicial and not an arbitrary discretion.

Messrs. J. Reuben Long, of Conway, and P. H. McEachin, of Florence, for Appellants, cite: As to mere suspicion not being sufficient to support a conviction: 26 S. E. 507, 2 Va. 458; 174 S. E. 763; 74 S. C. 460, 55 S. E. 120; 49 S. C. 285, 26 S. E. 619, 27 S. E. 199; 66 S. C. 394, 44 S. E. 968, 97 Am. St. Rep. 768; (S. C.) 4 S. E. (2d) 121. As to the evidence, as a whole, not being sufficient to support a verdict of guilty: 191 S. C. 328, 4 S. E. (2d) 121; 74 S. C. 460, 55 S. E. 120; 49 S. C. 285, 26 S. E. 619, 27 S. E. 199; 66 S. C. 394, 44 S. E. 968, 97 Am. St. Rep. 768; (S. C.) 7 S. E. (2d) 467. As to a motion for change of venue on the ground that an impartial jury cannot be obtained being addressed to discretion of court and is a judicial and not an arbitrary discretion: 231 S. C. 655, 99 S. E. (2d) 672.

Richard G. Dusenbury, Esq., Solicitor, of Florence, for Respondent, cites: As to the evidence upon the whole case, under the circumstantial evidence rule, being sufficient to support a verdict of "guilty" as to the defendants: 110 S. C. 560, 96 S. E. 909; 175 S. E. 277. As to rule that while a

confession improperly obtained cannot be admitted, yet so much of the confession as relates strictly to the fact discovered by it may be given in evidence: 107 S. E. 149.

November 15, 1960.

OXNER, Justice.

Appellants, W. H. Graham and James Holland, were convicted on a charge of willfully and feloniously setting fire to the Florence Hotel and its contents, the property of W. H. Graham, and of aiding, counseling and procuring the burning of said hotel and contents, with the intent to injure and defraud certain named insurance companies which had insured said property against loss or damage by fire. Graham was sentenced to imprisonment for a term of eighteen months and Holland for a term of twelve months.

We shall first discuss the exceptions relating to the sufficiency of the evidence to sustain the verdict. It is contended that the Court erred in refusing a motion by appellants for a directed verdict made when the State rested and again at the conclusion of all the testimony.

It may be well at the outset to state certain facts that seem to be undisputed. The Florence Hotel, a four-story building with about 80 rooms, is located in the main business district of the City of Florence. The Sanborn Hotel is immediately across the street. A fire station is only two blocks away. A policeman is regularly on duty in this area. The fire was discovered between 8:00 and 8:30 on the night of Tuesday, December 23, 1958. Some of the business places were still open.

This hotel was purchased in 1955 by Graham for \$100,000.00. He says that he paid \$20,000.00 cash, assumed a first mortgage of \$50,000.00 and gave the seller a second note and mortgage for \$30,000.00, and that at the time of the fire this mortgage indebtedness had been reduced to approximately \$55,000.00. The building was insured against fire for \$90,000.00 and the contents for \$20,000.00. The hotel had been operated by Graham since he acquired it in

1955. Previously he had operated hotels at Marion, Conway, and Myrtle Beach. He and his wife had an apartment on the first floor. The employees consisted of a night clerk, two Negro maids and four Negro bellboys, one of whom was appellant James Holland. He had worked at hotels for Graham for a period of fourteen or fifteen years. Holland was the only colored employee who lived at the Florence Hotel. He had a room on the first floor near the rear of the building. On the night of the fire there were about seven permanent guests, all of whom had rooms on the second floor. There is some testimony, although it is not definite, that there was also a transient guest in the hotel that night. No one was occupying a room on either the third or the fourth floor. The hotel was equipped with a sprinkler system. When the heat reached a certain point, it would start operating which would cause the alarm bell to ring. This system was in good working order on the night of the fire.

The testimony offered by the State to establish the incendiary nature of the fire and appellants' connection with it may be briefly summarized as follows:

Although the alarm bell attached to the sprinkler system started ringing not later than 8:15 on the night of the fire, the Fire Department did not receive a call until approximately 8:25. The bell was heard by a fireman who was off duty and about a third of a block away. He immediately went to the hotel and found water seeping through the ceiling. Mrs. Graham was behind the desk and Graham was standing nearby. After this fireman talked to Mrs. Graham, she called the Fire Department. He then went up on the second floor where water was running from the ceilings and there was considerable smoke and saw appellant Holland "coming off the steps from the third floor." Holland told him that there was a man, Sam Wilson, in room 208 who was drunk and would not unlock the door. This fireman then knocked the door open with his shoulders, and found Wilson heavily intoxicated, standing in the middle of the room. He was reluctant to leave, stating that he had not done anything.

Finally, he was taken to the lobby by this fireman and Holland. The alarm was also heard by a policeman standing in front of the Sanborn Hotel. He immediately went across the street to the Florence Hotel where he saw smoke coming from a window. He went back to the Sanborn Hotel and after calling the Police Department, returned to the Florence Hotel where he saw Mrs. Graham working at the desk.

The fire trucks arrived within a minute or a minute and a half after receiving the call at 8:25. The firemen found one room on fire on the fourth floor and eleven or twelve rooms on fire on the third floor. All of these fires were disconnected. There was a definite odor of some petroleum product. The fire was brought under control in about an hour and a half. After that a careful examination was made of the building. It was found that holes about an inch in diameter had been bored with a brace and bit in the baseboard of the rooms and also a few holes were bored in the walls. Under these holes there were burned shavings. Burned matches were around various places where the fires started. There were stained places on the rugs. These spots had burned. A pair of gloves, similar to those worn at times by Holland, were found near the rear basement door about ten feet from his room. These gloves were wet and had "an oily smell." One of them was in a trash can and another outside of the trash can. Holland was the only bellboy who used gloves around the hotel. A cap from an oil can was found in a room on the fourth floor in which there had been no fire.

There had been guests in the rooms on the third and fourth floors on the previous Saturday night but none since. The two colored maids testified that the rooms on these floors were cleaned by them on Monday, the day before the fire, and that at that time there were no holes in the walls or shavings or matches on the floor. No odor was noted. The maids said after cleaning these rooms on Monday the doors were locked, as was usually done, and that they never had occasion to go back on either the third or the fourth floor. On the day of the fire they only cleaned the rooms on the second

floor and finished their work about 2:00 o'clock in the afternoon.

There were three keys on a string which the maids used in unlocking the hotel rooms. They got them from the linen room when they went to work and at the end of each day, returned them to the linen room and put the nightlatch on. Other than these and the regular keys used by the guests, the only means of unlocking the doors was by a passkey which was kept on a brass ring at the desk. It would unlock any of the rooms as well as the linen closet. An examination on the night of the fire disclosed that this passkey had been removed from the ring.

Graham seems to have had considerable trust in Holland who, as heretofore stated, had been in his employ for a number of years. Holland was the only one who had a key to his apartment. Several days after the fire Holland, who continued to work for Graham, was seen alone with him and his wife in the lobby of the hotel and when taken into custody about three weeks after the fire, was working for Graham's son-in-law in Horry County.

Holland and another bellboy worked at the hotel on the day shift. Their hours were from 8:00 in the morning until 8:00 at night. Quite frequently Holland stayed overtime. The bellboy who worked with him testified that they were together in the lobby during the afternoon before the fire but that Holland disappeared from the lobby about 7:00 o'clock that night and had not returned by 8:05 when this bellboy said he got off from work. About midnight after the fire the officers questioned Holland. He said that he was in the room asleep when the fire started and was awakened by water coming from the ceiling. He first stated that he had not been on the third floor in ninety days but later said that about 2:00 o'clock in the afternoon of the day of the fire, he went to the third floor to get some linen. Subsequently he said "he went up on the third floor to pick up some linen and the fire run him out."

Two of the bellboys worked at night, starting about 8:00 o'clock. One of them testified that when he came to work on the night of the fire, Graham instructed him: "You boys keep a close eye, front, because I am expecting a pretty good crowd to come in tonight." The State's testimony discloses no basis for this expectation.

Apparently Graham was in the lobby continuously for several hours before the fire was discovered. At least, there is no testimony to the contrary. However, it may be fairly inferred from the State's testimony that upon discovery of the fire, he was unconcerned and indifferent, making no effort to rescue any of his property or that of his guests. He remained calmly in the lobby.

On August 11, 1958, Graham offered to sell the hotel and furnishings to a business man in Marion for \$77,000.00. About six months before the fire a Mr. Pate, who operated the Sanborn Hotel, contacted Graham about buying the Florence Hotel. Graham wanted \$125,000.00 but later stated that he would take \$100,000.00. These negotiations continued off and on, sometimes at the instigation of Graham and at other times at the instigation of Pate, until the day of the fire. On that day Pate offered Graham \$90,000.00, \$5,000.00 of which was to be paid in cash and the balance represented by mortgages. Graham declined the offer, stating that he thought he would wait until Pate secured more cash. During these negotiations, Graham indicated to Pate that he needed a substantial amount of cash to buy a motor court at Myrtle Beach. It appears that the monthly installment on the first mortgage on the hotel, due December 17, 1958, was not paid until December 29th, after the fire.

On August 20, 1958, a fire insurance agent in Florence discussed with Graham the question of insurance on the hotel. Graham had none at that time. The agent could not then get the full amount of the coverage desired by Graham but some insurance was written. Finally, in October the agent secured in four companies fire insurance of \$90,000.00

on the building and \$20,000.00 on the contents. Two or three weeks before the fire, Graham called this agent and indicated a desire to reduce the amount of insurance so as to cut down the premiums. However, nothing along this line was ever done.

Under the foregoing evidence did the Court err in
1 refusing the motion for a directed verdict made at the conclusion of the State's case? The test to be applied in passing on such a motion is stated in *State v. Littlejohn*, 228 S. C. 324, 89 S. E. (2d) 924, 926, as follows:

"In considering whether the court below erred in not directing a verdict in favor of the defendant, we must view the foregoing testimony in the light most favorable to the State. *State v. Epes*, 209 S. C. 246, 39 S. E. (2d) 769. It must be remembered, too, that there is one test by which circumstantial evidence is to be measured by the jury in its deliberations, and quite another by which it is to be measured by the trial judge in his consideration of the accused's motion for a directed verdict. As to the former, it is necessary that every circumstance relied upon by the state be proven beyond a reasonable doubt; and that all of the circumstances so proven be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one; and if, assuming them to be true, they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed. * * * Such test goes to the weight of the evidence, and is therefore to be applied by the jury in their consideration of it. *State v. Roddey*, 126 S. C. 499, 120 S. E. 359. But on a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the

accused, or from which his guilt may be fairly and logically deduced."

No serious question arises as to the proof of the *corpus delicti*. That the fire was of an incendiary nature admits of little doubt. The difficult question is whether there is sufficient evidence from which a jury could conclude that appellants were the incendiaries or procured the burning of the hotel. We think there is. It could be reasonably inferred that this was an inside job; that an outsider would not have had access to these rooms which had been left securely locked; that the incendiary used the passkey from the desk in unlocking the doors; that this passkey was secured by someone working at the hotel; and that such person had knowledge of the fact that the rooms on the third and fourth floors were unoccupied. Both of the colored maids and all of the bellboys except Holland testified for the State and if their testimony is believed, they had no connection with the fire. The hotel was heavily mortgaged and the evidence warrants a conclusion that it was overinsured. There was an unexplained delay on the part of Graham and his wife in calling the Fire Department. In fact, no call was made until requested by the off-duty fireman. After Mr. and Mrs. Graham knew the hotel was on fire, they exhibited no excitement and remained in the lobby apparently indifferent to the consequences. Graham seemed to be anxious that the bellboys remain in front. Holland was his trusted employee. He had known him for a long time and kept him in his employ after the fire. Holland disappeared from the lobby about an hour before the fire was discovered. That night some gloves similar to those worn by him were found at the rear of the building near his room. They were wet and had an "oily smell." After the fire Holland made false statements as to his whereabouts when it started and conflicting statements as to when he had last been above the second floor.

Graham is the only person who had a motive to burn the hotel. There is some suggestion by appellants' counsel that Sam Wilson had a motive. They say that he had previously

been employed by Graham and fired. But there is no evidence that he had any animosity toward Graham. In fact, the evidence shows that he was so heavily intoxicated that it is very unlikely that he could have bored the holes in the rooms and set all these fires. Apart from this, there is the improbability that one living in a hotel would set it on fire and then lock himself in his room and refuse to open the door. Nor is there any substantial evidence that any outsider was seen that day around the hotel who had an opportunity to set it afire. It is true that one of the bellboys testified that about 3:30 that afternoon a stranger inquired about a rest room and was taken up on the elevator to the third floor but according to the testimony of this bellboy, the stranger remained on the third floor only a minute and was taken back on the elevator to the lobby. Of course, someone could have entered from the rear of the hotel and gone up the back stairway or the fire escape, but to have done this job he would have had to have taken with him a brace and bit and a key to unlock the doors of the rooms.

While the evidence for the defense contradicts in many particulars that offered by the State, making factual issues for the jury, there was no error in refusing the motion for a directed verdict made at the conclusion of all the testimony. A number of witnesses for appellants testified that for two or three hours prior to the fire, neither Holland nor Graham was out of the lobby for any appreciable length of time. Holland denied any connection with the fire. He said that he had never owned or used the gloves found at the rear door of the hotel. He denied making the statements attributed to him by the officers. Mrs. Graham said that Holland never had possession of the passkey on the day of the fire and that this key remained on the ring until three or four weeks after the fire, at which time the hotel was closed and she took the key off the ring so she could put it in her pocketbook. She testified that her husband, who was in front of the hotel when the bell started ringing, came in the lobby and asked her to call the Fire Department, which she did, and that a

little later some person came in the lobby and ran upstairs and when he came down also asked her to call the Fire Department, whereupon she made a second call. After this was done, she says that she started calling the rooms of the guests on the second floor so as to notify them of the fire. Graham denied telling one of the bellboys on the night of the fire to stay in front as he was expecting a big crowd, stating that the only instruction along this line was a general one to all the bellboys that one of them should always stay in front of the hotel to meet the guests. He denied offering to take \$77,000.00 for the hotel in August. He testified that since acquiring it he had renovated the rooms at a cost of approximately \$25,000.00, and that he valued the hotel at \$125,000.00 or \$130,000.00. He said that he was in the lobby with some friends looking at television for some time before the fire, after which he and a friend, who was a part time clerk at the hotel, walked out in front. In a few minutes they heard the bell. After the bell had been ringing for about five minutes, he and his friend went to the place where the bell was located and saw water running down. He said he then went in the lobby and told Mrs. Graham to call the Fire Department. He corroborated the testimony of Mrs. Graham that the key was not taken off the ring until about three weeks after the fire. He admitted on cross examination that business at the hotel was only fair and was "dropping down." He also admitted that after the Fire Department was called, he did nothing except stand or sit in the lobby. The following is taken from his testimony on cross examination:

"Q. You saw some of that water coming down in the lobby? A. I knew it was water coming down.

"Q. What did you do? A. Nothing, except sit in the lobby."

Although several guests upon learning of the fire immediately went to the hotel and proceeded to their rooms on the second floor to save their effects, Graham did nothing. In fact, he never went up on the third floor to inspect the damage until the morning after the fire. He had no explana-

tion as to its origin and apparently did little to find out. He testified:

"Q. Do you know who set these fires? A. I don't.

"Q. Have you made any effort to find out? A. I employed Mr. Purvis (one of his attorneys) to try to find out for me.

"Q. Has Mr. Purvis found out? A. Not that I know of.

"Q. What all has Mr. Purvis done? A. I don't know."

In reply, the off-duty fireman said that when he reached the lobby Mrs. Graham told him that she had not called the Fire Department and he then requested her to do so. The dispatcher on duty at the Fire Department that night testified positively that his records only showed one call from Mrs. Graham.

If, as we have held, there was no error in denying a
2 motion for a directed verdict made at the close of the State's testimony, there was none in refusing the motion made at the conclusion of all the testimony, for that of the defense only made factual issues for determination by the jury. Graham sought to explain the delay in giving the fire alarm by testimony to the effect that for some time prior to the fire, the sprinkler system was not functioning properly and on several occasions rang for several minutes when, in fact, there was no fire. But the sufficiency of this explanation was for the jury. The witnesses for the State testified that when these false alarms were made, the bell rang only momentarily or certainly not over a minute.

While perhaps neither of the circumstances hereto-
3 fore related, standing alone, may have been sufficient to warrant an inference of guilt, when all are taken together, they reasonably point to that conclusion. Much stress is placed upon an observation of the trial Judge in passing on the motion for a directed verdict that he would be "worried" if he were on the jury. But any opinion of his as to the weight of the evidence did not require him to direct a verdict. He was not called upon to determine whether appellants were guilty. His function was solely to determine

whether the evidence was sufficient to require the submission of the case to the jury. He, of course, was empowered to set aside the verdict if he felt there had been a miscarriage of justice, but this he declined to do.

We now turn to other questions raised by the exceptions. It is argued that the Court erred in admitting 4 confessions made by Holland under duress and in failing to give appropriate instructions as to the law of confessions. But we do not think the statements made by Holland while in the custody of the officers as to his whereabouts when the fire occurred and as to when he had last been on the third floor of the hotel can be properly classified as confessions. *State v. Pittman*, 137 S. C. 75, 134 S. E. 514, 520; *State v. Edwards*, 173 S. C. 161, 175 S. E. 277. In *State v. Pittman*, the Court quoted the following with approval: "A 'confession', in a legal sense, is restricted to an acknowledgement of guilt made by a person after an offense has been committed, and does not apply to a mere statement * * * of an independent fact from which such guilt may be inferred." Moreover, there is abundant testimony to the effect that these statements by Holland were freely and voluntarily made.

By two exceptions it is claimed that the Court erred 5 in admitting in evidence the can cap and gloves. It is said that the cap was not connected in any way with either appellant and that the evidence was not sufficient to identify the gloves as having belonged to Holland or to show that they had any connection with the crime. Both of these articles were discovered by the firemen immediately after the fire. The can cap was admissible for whatever it might have been worth as a link in the chain of evidence tending to establish the corpus delicti. The fact that Holland had been seen wearing gloves similar to those introduced in evidence justified their admission. Of course, the weight to be given this circumstance was for the jury.

It is next contended that the trial Judge permitted 6, 7 the State on two occasions to attack the reputation of Graham. The first complaint is that Graham was

prejudiced in being asked whether the Fire Department had previously been called to the hotel. After Graham had testified that on several occasions the bell connected with the sprinkler system had given a false alarm, ringing for as long as two or three minutes, he was asked if on either of these occasions he had called the Fire Department. He replied in the negative but said he thought his employees had done so. We do not think this testimony tended to show previous fires at the hotel but only that the alarm bell had been giving trouble. There was no prejudice. Secondly, it is contended that the Court permitted testimony tending to show that Graham and his wife had lived in unlawful cohabitation at the hotel prior to their marriage. We do not think the testimony complained of warrants that inference. A policeman in testifying that he had known Mrs. Graham for a number of years stated that she came to work there before she and Graham were married. It would certainly be far-fetched to infer from this that there was any improper relations between these two people prior to their marriage.

Lastly, it is contended that the Court erred in refusing to change the venue upon the ground that appellants could not obtain a fair and impartial trial in Florence County. Counsel for appellants offered testimony and affidavits tending to show that beginning after the fire and continuing up to the time of the trial, newspaper accounts and statements made over the radio and television created an impression that appellants were guilty and strongly prejudiced them throughout the county. To controvert this showing, the State offered testimony and affidavits to the effect that there was no prejudice against appellants and that a fair and impartial trial could be had in Florence County. It is well settled that a motion for change of venue on the ground that an impartial jury cannot be obtained is addressed to the discretion of the court which, of course, is a judicial and not an arbitrary discretion. *State v. Mouzon*, 231 S. C. 655, 99 S. E. (2d) 672; *State v. Britt*, 235 S. C.

395, 111 S. E. (2d) 669. After careful consideration of the testimony and affidavits offered by the parties, we find no abuse of discretion.

Affirmed.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

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STATE, Respondent, v. William Otis BRITT and Douglas WEST-BURY, Appellants
(117 S. E. (2d) 379)

Murder prosecution. The General Sessions Court, Orangeburg County, G. Badger Baker, J., rendered judgment, and defendants appealed. The Supreme Court, Moss, J., held that where writ directing drawing of names of extra petit jurors was issued January 7, for term commencing on January 11, and defendant's counsel was present at time extra venire was drawn, so that counsel had from January 7 to January 11 to study extra venire, denial of motion for continuance to enable defendant to study list of additional jurors was not error.

Judgment affirmed.

1. CRIMINAL LAW.—Where writ directing drawing of names of extra petit jurors was issued January 7, for term commencing on January 11, and defendant's counsel was present at time extra venire was drawn, so that counsel had from January 7 to January 11 to study extra venire, denial of motion for continuance to enable defendant to study list of additional jurors was not error.
2. CRIMINAL LAW.—In murder prosecution, trial court could properly admit each defendant's confession, which allegedly implicated others, while ruling and instructing that each confession was evidence only against its maker.
3. CRIMINAL LAW.—Evidence of a murder prosecution defendant's willingness to take a lie detector test is inadmissible whether the defendant is tried separately or jointly with a codefendant.
4. CRIMINAL LAW—WITNESSES.—A codefendant's confession is not admissible against a defendant whether they are tried separately

- or jointly, and if a codefendant testifies a defendant may impeach him by showing prior convictions, whether the trials be joint or separate.
5. CRIMINAL LAW.—Contentions that, upon separate trial, a codefendant's confession would not be admissible against defendant, and that defendant might impeach codefendant by showing prior convictions, did not, since defendant had same rights upon a joint trial, require grant of a separate trial.
 6. CRIMINAL LAW.—A defendant could show, on joint trial with codefendant, that he had been overpersuaded and dominated by codefendant, and did not require grant of separate trial to introduce any such evidence.
 7. CRIMINAL LAW.—Trial court in murder prosecution did not abuse discretion in denying defendants' motions for severance and separate trials.
 8. JURY.—It is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair and impartial, and that no one of them is disqualified.
 9. JURY.—Trial judge in murder prosecution properly asked jurors whether they were opposed to capital punishment, and did not abuse discretion or commit error of law in failing to ask jurors whether they had a bias or prejudice either in favor of or against capital punishment. Code 1952, § 38-202.
 10. JURY.—Where murder prosecution defendant did not exhaust his 10 peremptory challenges, he could not complain of trial judge's refusal to dismiss a juror for cause. Code 1952, § 38-211.
 11. JURY.—Extra petit jurors whom trial court directed be drawn for prospective service in murder prosecution were properly drawn from tales box, rather than from regular jury box. Code 1952, §§ 38-60, 38-61, 38-72, 38-74.
 12. CRIMINAL LAW.—In absence of a showing of prejudice from procedure whereby special or extra venire was drawn or summoned before regular panel was exhausted, a procedure whereby the defendant was allowed additional time to study list of jurors, error, if any, was harmless. Code 1952, §§ 38-68, 38-72, 38-214.
 13. CRIMINAL LAW.—Record of murder prosecution did not disclose that defendant was prejudiced by trial court's permitting counsel for codefendant to ask certain questions of prospective jurors.
 14. JURY.—Scope and limits of interrogation of a juror on *voir dire* is within sound discretion of judge, and it is for him to determine character of questions proposed and when examination shall cease.
 15. JURY.—A trial judge may permit counsel also to examine jurors, but better practice is for judge, not attorneys, to conduct examination.

16. CRIMINAL LAW.—JURY.—Question of prospective jurors' bias or prejudice is one of fact for determination by trial judge, and is not reviewable unless it appears that trial judge's conclusion was wholly without evidence to support it.
17. JURY.—Trial judge in murder prosecution did not commit error with respect to refusing a defendant permission to offer evidence of bias and prejudice on part of prospective jurors, denying him right of cross examination on *voir dire*, or making inadequate examination of jurors.
18. CRIMINAL LAW.—Record on appeal in murder prosecution did not disclose prejudice to defendants from fact that trial judge permitted jury to disperse.
19. CRIMINAL LAW.—Trial judge in murder prosecution had discretion with respect to making inquiry into jury's conduct while dispersed, and prejudiced was not shown by his refusal to make such inquiry.
20. CRIMINAL LAW.—Trial court in murder prosecution properly admitted defendant's written confession, submitting to jury issue whether it was voluntary or involuntary. Code 1952, §§ 1-64, 26-7.1.
21. CRIMINAL LAW.—Murder prosecution defendant who expressly consented to admission of certain evidence could not complain of its introduction.
22. CRIMINAL LAW.—Defendant-appellant had burden to satisfy reviewing court that there was prejudicial error in admission of exhibit.
23. CRIMINAL LAW.—In prosecution for murder of policeman, admission of policeman's last speeding ticket was not prejudicial error.
24. HOMICIDE.—In prosecution for murder of policeman, policeman's last speeding ticket was admissible as relevant to prove that policeman was on duty and patrolling highways just before he lost his life.
25. CRIMINAL LAW.—In murder prosecution, wherein objection to witness' testimony as irrelevant was sustained, any error on part of court in ruling that witness was a witness on behalf of defendant was harmless.
26. HOMICIDE.—Evidence in murder prosecution was insufficient to require submission of lesser offense of manslaughter.

James N. Rahal, Esq., of Savannah, Georgia, for Appellant, William Otis Britt, cites: As to error on part of trial Judge in refusing motion for continuance: 110 S. C. 273, 96 S. E. 416; 189 S. C. 281, 1 S. E. (2d) 190. As

to this defendant being substantially prejudiced by the denial of the motion for severance: 108 S. C. 490, 95 S. E. 61; 121 S. C. 443, 114 S. E. 415; 128 S. C. 414, 122 S. E. 513; 152 S. C. 17, 149 S. E. 348, 70 A. L. R. 1133; 174 S. C. 225, 177 S. E. 143; 174 S. C. 344, 177 S. E. 318; 205 S. C. 450, 32 S. E. (2d) 372; 211 S. C. 52, 43 S. E. (2d) 607; 121 S. C. 461, 48 S. E. (2d) 313; 221 S. C. 504; 71 S. E. (2d) 410; 227 S. C. 287, 87 S. E. (2d) 826. *As to refusal of request to charge the law of manslaughter, where a theory existed upon which a verdict of manslaughter could rest, constituting reversible error:* 16 S. C. 464; 68 S. C. 421, 47 S. E. 676. *As to defendant being prejudiced by failure of trial Judge to hold the jury together overnight:* 57 Am. Jur. 632, 633, Sec. 872; 159 S. C. 119, 155 S. E. 599; 166 S. C. 63, 164 S. E. 415; 203 S. C. 167, 26 S. E. (2d) 506; 205 S. C. 412, 32 S. E. (2d) 163.

Messrs. C. Walker Limehouse and Henry R. Sims II, of Orangeburg, for Appellant, Douglas Westbury, cite: *As to error in method used to supply deficiency of jurors:* 27 S. C. 80, 2 S. E. 854; 233 S. C. 400, 105 S. E. (2d) 73; 2 Hill 381; 11 S. C. 319. *As to error on part of trial Judge in his voir dire examination of the members of the jury panel with respect to the form of questions dealing with opposition to capital punishment:* 211 F. (2d) 171, 48 A. L. R. (2d) 540; 31 Am. Jur. 674, Sec. 159. *As to trial Judge abusing his judicial discretion in failing to grant motion for separate trials of defendants:* 108 S. C. 490, 95 S. E. 51; 121 S. C. 443, 114 S. E. 415; 128 S. C. 414, 122 S. E. 513; 152 S. C. 17, 149 S. E. 348, 70 A. L. R. 1133; 174 S. C. 225, 177 S. E. 143; 174 S. C. 344, 177 S. E. 318; 205 S. C. 450, 32 S. E. (2d) 372; 211 S. C. 52, 43 S. E. (2d) 607; 212 S. C. 461, 48 S. E. (2d) 313; 221 S. C. 504, 71 S. E. (2d) 410; 227 S. C. 288, 87 S. E. (2d) 826; 111 S. E. (2d) 669; 174 S. C. 225, 177 S. E. 143. *As to error on part of trial Judge in permitting counsel for codefendant to examine prospective jurors:* 170 S. C. 178, 170 S. E. 142. *As to error on part of trial Judge in admit-*

ting in evidence a speeding ticket given by the deceased patrolman on the night of the crime: 194 S. C. 410, 10 S. E. (2d) 587. *As to right to cross examine freely and fully:* 35 S. C. 197, 14 S. E. 481. *As to error on part of trial Judge in admitting the confessions in evidence:* 18 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819; 77 S. Ct. 1358. *As to doctrine of in favorem vitae:* 209 S. C. 61, 38 S. E. (2d) 902; 12 S. C. 89.

Julian S. Wolfe, Esq., Solicitor, of Orangeburg, for Respondent, cites: *As to motion for continuance being addressed to the discretion of trial Judge, and he properly exercised it in refusing the motion:* 230 S. C. 386, 111 S. E. (2d) 657; 152 S. C. 17, 149 S. E. 348; 160 S. E. 301, 158 S. E. 685; 168 S. C. 221, 167 S. E. 396; 162 S. C. 509, 161 S. E. 177; 184 S. C. 290, 192 S. E. 365; 189 S. C. 281, 1 S. E. (2d) 190; 230 S. C. 405, 95 S. E. (2d) 857; 223 S. C. 1, 73 S. E. (2d) 850; 198 S. C. 215, 17 S. E. (2d) 142. *As to examination of jurors on their voir dire being properly conducted:* 20 S. C. 441; 93 S. C. 195, 75 S. E. 281; 120 S. C. 526, 113 S. E. 335; 65 S. C. 321, 43 S. E. 667; 65 S. C. 242, 43 S. E. 671; 34 S. C. 49, 12 S. E. 657; 16 S. C. 453; 211 S. C. 306, 45 S. E. (2d) 23; 211 S. C. 360, 45 S. E. (2d) 587; 228 S. C. 432, 437, 90 S. E. (2d) 492; 184 S. C. 304, 192 S. E. 360; 125 S. C. 281, 118 S. E. 620; 212 S. C. 61, 46 S. E. (2d) 545; 218 S. C. 106, 62 S. E. (2d) 100. *As to trial Judge properly refusing the motion for severance:* 235 S. C. 395, 111 S. E. (2d) 669; 152 S. C. 17, 149 S. E. 348. *As to jury being composed of qualified jurors:* 207 S. C. 478, 36 S. E. (2d) 742; 205 S. C. 171, 28 S. E. (2d) 788; 209 S. C. 482, 41 S. E. (2d) 100; 100 S. C. 248, 84 S. E. 778. *As to trial Judge properly admitting the confessions:* 235 S. C. 395, 111 S. E. (2d) 669; 127 S. C. 107, 120 S. E. 496; 199 S. C. 412, 19 S. E. (2d) 638, 62 S. Ct. 942, 316 U. S. 662, petition for writ of certiorari denied; 223 S. C. 1, 73 S. E. (2d) 850; 342 U. S. 36, 72 S. Ct. 97; 226 S. C. 44, 83 S. E. (2d) 629; 228 S. C. 88, 88 S. E. (2d) 880. *As to*

the conduct of a trial, including the admission and rejection of proffered testimony, being largely within the sound discretion of the trial Judge: 198 S. C. 98, 16 S. E. (2d) 532; 202 S. C. 9, 23 S. E. (2d) 820; 199 S. C. 55, 18 S. E. (2d) 616; 199 S. C. 412, 19 S. E. (2d) 638; 235 S. C. 356, 111 S. E. (2d) 657. *As to the rights of the defendants not being prejudiced by the trial Judge when he declined to confine the jury and it was unnecessary to poll the jury upon the reconvening of the Court:* 191 S. C. 1, 3 S. E. (2d) 257; 211 S. C. 360, 45 S. E. (2d) 587; 220 S. C. 224, 67 S. E. (2d) 82; 205 S. C. 412, 32 S. E. (2d) 163; 231 S. C. 655, 99 S. E. (2d) 672. *As to trial Judge properly ruling that the lie-detector test was not admissible in evidence:* 235 S. C. 395, 111 S. E. (2d) 669; 163 Kan. 622, 185 P. (2d) 147; 354 Mo. 181, 188 S. W. (2d) 43, 189 S. W. (2d) 541; 98 Cal. App. (2d) 124, 219 P. (2d) 70; 200 Va. 233, 105 S. E. 152. *As to order of arguments by counsel, as fixed by trial Judge, being proper:* 22 S. C. 298; 90 S. C. 138, 73 S. E. 564; 158 S. C. 471, 155 S. E. 849; 90 S. C. 138, 72 S. E. 564. *As to trial Judge properly refusing to charge the law of manslaughter as the evidence did not warrant such charge:* 235 S. C. 395, 111 S. E. (2d) 669; 8 S. C. 237; 65 S. C. 207, 43 S. E. 656, 95 Am. St. Rep. 795; 197 S. C. 371, 15 S. E. (2d) 669; 68 S. C. 321, 47 S. E. 384, 102 Am. St. Rep. 661; 208 S. C. 497, 38 S. E. (2d) 715; 88 S. C. 127, 70 S. E. 447; 212 S. C. 61, 46 S. E. (2d) 545; 133 S. C. 167, 130 S. E. 747; 194 S. C. 410, 10 S. E. (2d) 587; 208 S. C. 414, 38 S. E. (2d) 238; 68 S. C. 421, 47 S. E. 676; (Ga.) 20 S. E. 251. *As to trial Judge properly refusing motion for new trial:* 205 S. C. 514, 32 S. E. (2d) 825; 221 S. C. 312, 70 S. E. (2d) 342; 218 S. C. 106, 62 S. E. (2d) 100; 213 S. C. 553, 50 S. E. (2d) 687; 228 S. C. 438, 90 S. E. (2d) 640.

November 16, 1960.

Moss, Justice.

The Grand Jury of Orangeburg County did, on September 15, 1958, at a Court of General Sessions, return an in-

dictment charging William Otis Britt and Douglas Westbury, the appellants herein, along with Lee von Tilson, with the murder of Harry Boyd Ray, it being asserted that the homicide occurred in Orangeburg County on September 7, 1958. The three were duly arraigned upon such indictment and entered a plea of "Not Guilty". A motion for a continuance was made and granted at the 1958 September term of Court. The case was thereafter called for trial at Orangeburg, South Carolina, on January 5, 1959. The result of this trial was that the appellants herein were found guilty of murder and were sentenced to death by electrocution. Lee von Tilson was found guilty of murder with a recommendation to mercy. The appellants herein, from such conviction and sentence, appealed to this Court, and Lee von Tilson did not appeal from his conviction and sentence. We reversed the conviction of the appellants and remanded the case for a new trial. *State v. Britt et al.*, 235 S. C. 395, 111 S. E. (2d) 669.

The case against the appellants was retried at Orangeburg, South Carolina, commencing on January 11, 1960. The appellants were again found guilty of murder and were sentenced to death by electrocution. Following the conviction of the appellants, motions for a new trial were made and denied. Due notice of intention to appeal to this Court was given. The questions raised by the appellants will be considered *seriatim*.

When this case was called for trial the appellants made a motion for continuance beyond the term. The ground of the motion for continuance was that an additional venire of jurors had been drawn and the appellants had not had adequate time to properly study this list of additional jurors.

We have held in numerous cases that a motion for a continuance is addressed to the discretion of the trial Judge and his disposition of such motion will not be reversed unless it is shown that there was an abuse of such discretion to the prejudice of the appellants. *State v. Lytchfield*, 230 S. C. 405, 95 S. E. (2d) 857, 66 A. L. R. (2d) 263; *State*

v. Livingston, 223 S. C. 1, 73 S. E. (2d) 850; and *State v. Britt et al.*, 235 S. C. 395, 111 S. E. (2d) 669.

It appears from the record that on January 7, 1960, 1 the Clerk of Court for Orangeburg County issued a writ of venire facias, directing and requiring the jury commissioners of said Orangeburg County to draw, as provided by law, the names of twenty extra petit jurors, to appear before the General Sessions Court for said county on January 11, 1960. Pursuant to such writ, twenty extra petit jurors were duly drawn and summoned to serve as extra petit jurors at the term of General Sessions Court for Orangeburg County commencing on January 11, 1960. It appears from the record that one of the counsel for the appellant Westbury was present at the time the extra venire of jurors was drawn. Certainly counsel had from January 7, to January 11, 1960, to make a study of the extra venire of jurors drawn as aforesaid. In the case of *State v. Livingston*, 223 S. C. 1, 73 S. E. (2d) 850, 853, denial of a motion for a continuance was upheld where counsel for the defendant had been appointed by the court "three or four" days prior to the date of trial. It further appears that the trial Judge had all of the jurors, not only on the regular panel but on the extra venire, sworn and he examined them in detail and separately on their *voir dire*. There was presented for service as jurors only those who qualified upon such *voir dire* examination. A review of the entire record in support of the motion for a continuance convinces us that the trial Judge committed no error in refusing to grant such motion.

When this case was called for trial both of the appellants made a motion for a severance and separate trial. The appellants assert that their defenses are antagonistic to one another; that evidence in favor of one appellant would be admissible on a separate trial and would not be allowed on a joint trial; that evidence incompetent as to one of the appellants and introduced against the other appellant would be prejudicial to such other appellant; and that a confes-

sion by one of the appellants would be calculated to prejudice the jury against the other appellant. Additionally, the appellant Westbury asserts that if he were granted a separate trial he could offer testimony showing his cooperative attitude in submitting to a lie detector test; that he could impeach the testimony of the appellant Britt by showing his previous convictions of the offenses of robbery and grand larceny. The appellant Westbury also asserts that upon a separate trial he could show that he was the weaker of the two and that he was overpersuaded and dominated by Britt, resulting in the commission of the crime of murder with which he was charged.

When this case was before us upon the previous appeal, we held that a motion for a severance and separate trial on the part of one or more defendants in a case, where several persons are jointly charged with a criminal offense, is addressed to the discretion of the trial Judge, and only abuse of that discretion constitutes reversible error. *State v. Britt et al.*, 235 S. C. 395, 111 S. E. (2d) 669, 680, and the cases therein cited.

Each of the appellants made a written confession. These confessions concur as to many of the facts and details of the death of the deceased, who was a highway patrolman. It was contended by the appellant Britt that Westbury fired the shots that took the life of the patrolman. Westbury denies that he did fire the fatal shots. The dispute in the confessions as to who fired the fatal shots that took the life of the patrolman is the basis upon which the appellants assert that their defenses were antagonistic. When the confessions of the appellants were offered and received in evidence, the trial Judge properly ruled:

“ * * *, any alleged confession, if receivable in evidence, can only be considered as evidence against the party said to have made the confession and against no one else. It cannot be considered as evidence against a co-defendant. I will instruct you again on that. Keep that in mind. Any alleged confession is only evidence, if evidence at all, against

the party it is contended made the confession and what is said therein relating to someone else is not evidence against that person."

Time and time again the trial Judge reiterated such ruling, and in his able charge to the jury, said:

"* * * You are instructed, however, that when two or more persons are charged with a crime and a confession of one implicates the other, you cannot consider it against such other defendant because a confession can only be considered as evidence against the one who made it. Obviously, one defendant cannot by his confession impute, imply or point guilt to another."

What we said when this case was previously before
2 us is here applicable:

"Where the separate statement or confession of either of these parties implicated the others the trial court properly admitted such statement or confession against the person who made such, and he also correctly ruled that the statement or confession could not be considered against the others. He likewise charged the jury to this effect. *State v. Bagwell*, 201 S. C. 387, 23 S. E. (2d) 244 and *State v. Jeffords*, 121 S. C. 443, 114 S. E. 415.

"In the *Jeffords* case this Court said:

"The next assignment of error is in allowing confessions of Harrison and Treece to be introduced in evidence, in so far as they contained accusations of Jeffords. The rule is very clear that the confessions must be given as made. If we strike out any part, then the confession ceases to be the confession as made. The rule in such cases is clearly to let all the defendant's said be given, and the jury cautioned not to consider it against any one, except the man who makes it. This is unquestionably the rule, and it was strictly and scrupulously followed.'"

The appellant Westbury asserts that if he were
3 granted a separate trial he could offer testimony showing his cooperative attitude in submitting to a lie

detector test. In the previous opinion in this case we held that evidence that one of the appellants refused to take the lie detector test was inadmissible. Reference to the previous opinion is had for authorities supporting such holding. It is our opinion that evidence of the willingness of the appellant Westbury to take a lie detector test was inadmissible whether tried jointly with the appellant Britt or separately. In the case of *People v. Carter*, 48 Cal. (2d) 737, 312 P. (2d) 665, it was held, in a murder prosecution, that the trial court erred in not excluding a statement of the suspect that he was willing to take the lie detector test. In *Commonwealth v. Saunders*, 386 Pa. 149, 125 A. (2d) 442, it was held that since lie detector evidence is not admissible, neither is evidence of professed willingness or refusal, to submit to such test. In *Commonwealth v. McKinley*, 181 Pa. Super. 610, 123 A. (2d) 735, it was held that the results of a lie detector test being inadmissible, the offer of the accused to undergo such test was also properly excluded from the jury's consideration. In this connection see Vol. 2, A. L. R. (2d) Supplement Service, 1960 Issue, at page 1998.

It is also asserted by the appellant Westbury that if
4, 5 he were granted a separate trial that he could impeach the testimony of Britt by showing his previous convictions of the offenses of robbery and grand larceny. This position presupposes that upon a separate trial that Britt would be a witness against the appellant. Certainly upon a separate trial the confession of Britt would not be admissible against Westbury. The trial Judge ruled that the confession was not admissible against Westbury upon his joint trial with Britt. It is true that on a separate trial, should Britt have appeared as a witness against Westbury, his testimony could be impeached by showing convictions of robbery and grand larceny. If Britt had testified in this case, which he did not, his reputation for truth and veracity could have been impeached by showing his previous convictions of robbery and grand larceny. *State v. Britt et al.*,

supra. We do not think the trial Judge committed any error in refusing to grant a separate trial to Westbury upon the ground stated.

Westbury also asserts that upon a separate trial he 6,7 could show that he was overpersuaded and dominated by Britt. If such was a fact, there was no reason why Westbury could not have tendered such evidence in the trial of this case. We find no abuse of discretion or error of law on the part of the trial Judge in refusing to grant the motions made for severance and separate trials.

The appellant, Douglas Westbury, requested the trial Judge to propound certain questions to the jurors upon their *voir dire* examination. These requests dealt with relationship to the appellants or the deceased; whether they had formed or expressed an opinion as to the guilt or innocence of the accused; whether they were conscious of any bias or prejudice for or against the accused; whether they were aware of anything that would prevent the giving of a fair and impartial trial; and whether they were either a member of the grand jury that indicted the accused, or a member of the petit jury panel when this case was previously tried. These questions were asked upon such examination. In addition, Westbury requested the trial Judge to ask the jurors, "Are you conscious of any bias or prejudice either in favor of or against capital punishment?" The trial Judge, in conducting the examination, asked the question, "Are you opposed to capital punishment?" The appellant Westbury asserts that the failure of the trial Judge to ask the question propounded by him as to capital punishment, as above quoted, was error. It appears from the record that six of the proposed jurors affirmatively answered that they were opposed to capital punishment, and were excused as jurors. We have held that in a murder case, refusing to allow a juror to serve on the case, after admitting on his *voir dire* examination his disbelief in capital punishment for murder, was not error. *State v. Robinson*, 149 S. C. 439, 147 S. E. 441; *State v. Hyde*, 90 S. C. 296, 73 S. E. 180. In the case

of *State v. James*, 34 S. C. 49, 12 S. E. 657, 658, it was said:

“* * * When the juror was asked whether he was opposed to capital punishment, he answered unequivocally that he was. We do not think the judge committed error of law in rejecting the juror.”

In the case of *State v. Griggs*, 184 S. C. 304, 192 S. E. 360, 365, it was held proper in a prosecution for murder to question prospective jurors as to whether they were opposed to capital punishment, the Court saying:

“* * * We will state, however, that this is a question that has been customarily asked in cases where a conviction carried the penalty of death, and recognized by this court as a proper inquiry.”

In the instant case, the trial Judge, under his *voir dire* examination, asked all prospective jurors the statutory questions required by Section 38-202 of the 1952 Code of Laws. It should be pointed out that this section does not require an examination of a juror as to his opposition to capital punishment. However, where a conviction carries the penalty of death, the trial Judges customarily ask the prospective juror if he is opposed to capital punishment. We have held that after the statutory questions have been asked and answered, any further examination of a juror on *voir dire* must be left to the discretion of the trial Judge, which is subject to review only for abuse thereof. *State v. Bethune*, 93 S. C. 195, 75 S. E. 281. We have also held that the scope and limit of the interrogation of a juror on *voir dire* is within the sound discretion of the trial Judge, and it is for him to determine the character of the questions proposed, and when the examination shall end. *State v. Britt et al.*, *supra*. It is the duty of the trial Judge to assure himself that each and every prospective juror is unbiased, fair and impartial, and that no one of them is disqualified. We think the examination by the trial Judge of the jurors in this case, as to opposition to capital punish-

ment, was sufficient. There was no abuse of discretion or error of law in failing to ask the jurors the question relating to capital punishment as propounded by the appellant.

The appellant Westbury contends that the trial Judge
10 committed error in not dismissing for cause a prospective juror, T. E. Briggman. This juror, upon being examined on his *voir dire*, stated that he had formed an opinion as to the guilt of the appellants. He also stated that it would require evidence to remove such opinion, but notwithstanding this said opinion, he stated he could give a fair and impartial trial based solely upon the evidence produced in the case. He further testified that he was not conscious of being biased or prejudiced for or against the appellant. This juror further testified that he was a member of the petit jury in January, 1959, when this case was first tried, but that he did not serve on the trial jury. The trial Judge held that this juror was qualified and the appellant, Westbury, excused this juror by a peremptory challenge. The record shows that the appellant Westbury did not exhaust his ten peremptory challenges guaranteed to him by Section 38-211 of the 1952 Code of Laws. Since this appellant did not exhaust his peremptory challenges, he is in no position to complain of the trial Judge's refusal to dismiss this juror for cause. It was so held in the case of *State v. Gantt et al.*, 223 S. C. 431, 76 S. E. (2d) 674, 677, where this Court said:

“ * * * But, aside from this, the defendant did not exhaust his peremptory challenges, and therefore is not in a position to avail himself of error in overruling challenges for cause. *State v. McQuaige*, 5 S. C. 429; *State v. Anderson*, 26 S. C. 599, 2 S. E. 699.”

This exception is overruled.

It appears from the record that on January 7, 1960, pursuant to a direction of the Court, and a writ of *venire facias* issued by the Clerk of Court on the same date, the jury commissioners drew twenty extra petit jurors for service dur-

ing the second week of the term of the Court of General Sessions. These jurors were drawn from the tales box. Counsel for the appellant Westbury objected to the array of jurors so drawn upon the ground that the additional venire should have been drawn from the regular jury box rather than from the tales box. It is provided in Section 38-61 of the Code, that the jury commissioners not less than ten nor more than twenty days before the first day of each week of any regular or special term of the Circuit Court shall draw the requisite number of petit jurors to serve for such week only. It is also noted that Section 38-60 of the Code provides that at the time of the preparation of the regular jury box that the jury commissioners shall prepare in a special apartment in the jury box, which shall be known as "the tales box", the names of not less than one hundred nor more than eight hundred of such of the persons whose names appear on the jury list as reside within five miles of the courthouse, from which tales box shall be drawn jurors to supply deficiencies arising from any cause or emergency during the sitting of the court. Section 38-72 of the Code provides that when it is necessary to supply any deficiency in the number of petit jurors, duly drawn, whether caused by challenge or otherwise, the jury commissioners, under the direction of the court, shall draw from the tales box such number of fit and competent persons to serve as jurors as the court shall deem necessary to fill such deficiency. It is provided in Section 38-74 of the Code that in drawing the jurors from the tales box, the same rule shall be observed as in drawing from the jury box, except no notice of such drawing shall be necessary.

Under Section 38-72 of the Code, there can be no
11 doubt that if there is any deficiency in the required
number of petit jurors, such deficiency is supplied
from names drawn from the tales box. It was proper when
the additional jurors were drawn for them to be drawn from
the "tales box." In the case of *State v. Tidwell*, 100 S. C.
248, 84 S. E. 778, 780, this Court had this to say:

“For accuracy of statement the panel of thirty-six jurors will be referred to as the original panel, and the panel of fifteen jurors will be referred to as the additional panel, for the statute describes them as ‘additional jurors’.

“There is no difference betwixt the character of the men on the two panels; there is no difference in the agency by which the names have theretofore been put into and drawn out of the ‘jury box’; there is no difference in the agency by which the members of each may be brought into court; there is no difference in the manner by which each panel shall be presented to the accused on his trial. The only differences in the cases are these: One panel is put into the ‘jury box,’ and the other panel is put into the apartment of the jury box known as the ‘tales box’; one panel is summoned by a venire issued before term time and the other by a venire issued in term time.”

The additional jurors were drawn pursuant to an order and venire issued in term time for the convenient dispatch of the business of the Court, and it was proper to draw such additional jurors from the tales box. This exception is overruled.

The appellant Westbury urges as error that the special or extra venire of jurors were drawn and summoned to appear before the regular jury panel was exhausted. He relies upon Section 38-72 of the Code, which provides “Whenever it shall be necessary to supply any deficiency in the number of grand or petit jurors duly drawn, whether caused by challenge or otherwise”, then the jury commissioners shall, under the direction of the Court, draw from the tales box such number of fit and competent persons to serve as jurors as the Court shall deem necessary to fill such deficiency.

The record shows that the following took place with reference to the additional venire jurors:

“Mr. Limehouse: The next problem I had is this: an extra or additional venire of jurors has been summoned and I would like to be advised whether or not the twenty names will be put in the box with the forty?

"The Court: No.

"Mr. Limehouse: Draw first on the forty and then on the twenty?

"The Court: Yes, sir."

The transcript also shows that counsel for the appellant moved for a continuance of the trial of this case on the ground that they had not had ample and sufficient time to check on these additional jurors. The Court, in denying the motion, said: "As Presiding Judge, if he foresees the probability of additional jurors, he can have more drawn, I had it done so that you would have time to check the jurors."

The record also shows that when the Clerk, while the jury was being selected, announced to the Court, that the original panel had been exhausted, the trial Judge said: "You will now draw from the extra jurors." The Clerk of Court then placed the names of the extra or additional jurors in the box and proceeded to complete the jury from the extra venire of additional jurors.

Our Court has been liberal in holding that the provisions as to the drawing and summoning of jurors are usually directory only and not mandatory. In *State v. Wells*, 162 S. C. 509, 161 S. E. 177, 183, it was said:

" * * * Irregularities in the listing, drawing, and summoning of jurors may be often waived, and, even if not waived, are not in themselves acts so prejudicial as to require the quashing of a venire or to warrant the court in setting aside a judgment based upon a finding of verdict of a jury irregularly drawn. The purpose of our jury laws, found in Article 2 of Volume I of the Code, is to obtain fair and impartial jurors of good citizens who possess the constitutional qualifications of jurors and to have in the courts, when needed, the proper number of such jurors. The act of 1902, as amended in 1905, embraced in the Code as Article 2, Volume I, was enacted by the legislative branch with the intention of curing irregularities and technical errors, which so often occurred previous to those enactments, in the man-

ner of obtaining jurors in the Circuit Courts, and to prevent the great delays and expenses incidental to the trial of causes. It is the purpose of this Court to carry out the legislative intent, when it is possible to do so, without infringing the constitutional provisions as to the qualifications of jurors."

Section 38-68 of the 1952 Code provides that "No more than thirty-six persons to serve as petit jurors shall be drawn and summoned to attend at one and the same time in any court, unless the court shall so order." In the case of *State v. Jackson*, 32 S. C. 27, 10 S. E. 769, this statute was construed, and it was said that whether a greater number of jurors shall be drawn is a matter left to the discretion of the Court.

Section 38-214 of the 1952 Code provides that no
12 irregularity in any writ of venire facias or in the drawing, summoning, returning or impanelling of jurors shall be sufficient to set aside the verdict, unless the party making the objection was injured by such irregularity. The appellant in this case has not shown, or attempted to show, that he was prejudiced by the drawing of the extra venire of additional jurors. None of his rights were impaired or in any way interfered with by such action. The drawing of the jurors before the exhaustion of the regular panel was beneficial to the appellant. The record shows that counsel for this appellant was present at the time of the drawing of the extra venire and was, thereby, given additional time to check the jurors so drawn. This Court will not grant relief unless it appears that the appellant has been prejudiced. Since no prejudice appears, the error, if any, was harmless. This exception is overruled.

The appellant Westbury complains that the trial Judge erred in permitting counsel for the appellant Britt to examine prospective jurors. He asserts that such examination created an atmosphere antagonistic to the appellant.

We have carefully reviewed the record and the examination of jurors as made by counsel for the appellant Britt. We find nothing in the record that would indicate that such examination was prejudicial to the appellant Westbury.

In this case, at the request of counsel for the appellants, all prospective jurors were sworn on their *voir dire* for examination, as is provided in Section 38-202 of the 1952 Code. As we have previously stated, the scope and limits of the interrogation of a juror on *voir dire* is within the sound discretion of the trial Judge and it is for him to determine the character of the questions proposed and when the examination shall cease. The trial Judge may, if the circumstances seem to him to demand it, permit counsel engaged in the cause to also examine jurors. The better practice, however, is for the Judge, and not the attorneys, to conduct the examination. *Brown v. S. H. Kress & Co. et al.*, 170 S. C. 178, 170 S. E. 142. Even though in this case the trial Judge permitted counsel for the appellant Britt to ask certain questions of the prospective jurors, we find nothing in such examination that was prejudicial to the appellant Westbury. This exception is overruled.

The appellant Britt charges the trial Judge with error in refusing to permit him to offer evidence of bias and actual prejudice on the part of the prospective jurors, in that, on *voir dire*, he was denied the right of cross examination, and the trial Judge refused to make adequate examination of the jurors. The record shows that the trial Judge sufficiently examined the jurors to determine whether they were indifferent in the cause. This is a question of fact for determination by the trial Judge and is not reviewable in this Court unless it should appear that his conclusion is wholly without evidence to support it. *State v. Fuller*, 229 S. C. 439, 93 S. E. (2d) 463. The trial Judge in this case did, with meticulous care, examine each and every prospective juror and presented them only when found

to be fully qualified and indifferent. This exception is overruled.

The next question for determination is whether or not the trial Judge committed an abuse of discretion in failing to keep the trial jury together during the progress of the trial, and in refusing to examine the members of the jury panel with respect to whether they had read or heard any comments concerning the case while they were separated and away from the courtroom.

The record shows that the trial Judge permitted the members of the jury panel to go to their respective homes at night, after appropriate admonition that they should not communicate with others or allow others to communicate with them concerning the case.

We have held in numerous cases that a trial Judge
18 may keep a jury together or he may allow them to separate during the trial, and this Court will not upset any action he takes thereabout, unless it clearly appears that the discretion given him was abused. This rule applies in capital cases. *State v. Williams*, 166 S. C. 63, 164 S. E. 415; *State v. Dawson*, 203 S. C. 167, 26 S. E. (2d) 506; *State v. Mouzon et al.*, 231 S. C. 655, 99 S. E. (2d) 672. There is no showing that the appellants were prejudiced by the fact that the trial Judge permitted the jury to disperse. The appellants do not assert that improper influences of any kind were brought to bear upon the jury as a whole, or any member thereof. In the absence of any such showing, we will assume that every member of the jury obeyed the admonition of the trial Judge. There is nothing in the record to show any resulting prejudice to the appellants by permitting the trial jury to disperse during recess hours.

We do not think that the trial Judge committed any
19 error in refusing to examine the members of the jury with respect to whether they had read or heard any comments on the case while they were separated and away from the courtroom. A matter of this nature must,

of necessity, be left to the sound discretion of the trial Judge, and his refusal to inquire of the jury concerning such was not prejudicial to the appellants, at least the record shows no prejudice.

The appellant Westbury asserts that the Court com-
mitted error in admitting his confession into evi-
dence. An examination of the record shows that there
was evidence to the effect that the alleged confession of
Westbury was voluntary and that a copy of such confession
was given to the appellant in conformity with Sections 1-64
and 26-7.1 of the 1958 Cumulative Supplement to the 1952
Code. The trial Judge submitted to the jury the issue as
to whether the confession was voluntary or involuntary.
The ruling of the trial Judge was in accordance with the ap-
proved practice in this State and affords no basis for a find-
ing of prejudicial error. *State v. Britt, supra*, and *State v.*
Bullock, 235 S. C. 356, 111 S. E. (2d) 657. This exception
is overruled.

There was admitted into evidence from Patrolman
21-23 Ray's summons book, the last ticket written by him
on September 7, 1958, at 12:45 A. M., charging a
motorist with driving too fast for conditions. The testi-
mony shows that this ticket was in the handwriting of Pa-
trolman Ray and that the witness found the summons book
at the place where the patrolman lost his life. The solicitor
attempted to offer in evidence the entire summons book.
Counsel for the appellant Westbury objected on the ground
that it was not relevant to any issue in the case. After some
discussion, counsel for the appellant, said: "Your Honor,
we object to any part other than the speed ticket that he is
desirous of putting in." The Court then, in conformity with
the objection, admitted the last ticket written by Patrolman
Ray, as is hereinabove described. We think no error was
committed in the admission of this ticket. The appellant
is not in position to complain of its introduction into evi-
dence when he expressly consented thereto, as the above

quote shows. A review of the record shows no prejudice to the appellant by the introduction of the foregoing speeding ticket. The burden is upon the appellant to satisfy this Court that there was prejudicial error in the admission of this exhibit. This he has not done. *State v. Bullock, supra*. In the case of *State v. Gregory*, 198 S. C. 98, 16 S. E. (2d) 532, 534, the Court said:

"At the outset we repeat the time-honored tenet that ordinarily the conduct of a trial, including the admission and rejection of proffered testimony, is largely within the sound discretion of the trial judge and his exercise of such will not be disturbed by this Court on appeal unless it can be shown that there has been an abuse of discretion, a commission of legal error in its exercise, and that the rights of the appellant have been thereby prejudiced."

The confession of Westbury says that the appellants, 24 with Tilson driving the car, left the motel which they had robbed, "at an awful speed and a patrolman got in behind us." The patrolman followed the car some distance and stopped the automobile, apparently for speeding. The introduction of the speeding ticket was relevant to show that the officer was on duty and that he was patrolling the highways just before he lost his life in the encounter with the appellants and Tilson. We think there was no error in the admission of this exhibit.

The appellant Westbury asserts that the trial Judge 25 committed error in not permitting him to ask of an employee of Bowyer Motors of Savannah, Georgia, whether the appellant Britt had made a payment to this automobile company in the amount of \$417.00 on September 8, 1958. It appears that this witness was the keeper of the records of Bowyer Motors and that when the State attempted to establish the account of the appellant Britt, objection was made by his counsel, and such was sustained by the Court. Thereafter, the counsel for Westbury attempted to prove the payment upon Britt's account of the aforemen-

tioned sum. This testimony was not relevant to any issue in the case. Objection to such was properly sustained. Hence, the question of whether it was error on the part of the Court to rule that this witness became a witness in behalf of the appellant was harmless, because the testimony was irrelevant to any issue in the case. This exception is overruled.

The appellant Britt asserts that the Court committed
26 error in refusing to charge the law of manslaughter.

We have carefully examined the testimony as is contained in the record and it fails to suggest to us any theory upon which a verdict of manslaughter could rest. We reaffirm our previous holding where we said that a new trial would not be granted for failure to charge the law of manslaughter, where there is no evidence tending to reduce the crime from murder to manslaughter. This exception is overruled. *State v. Britt et al., supra.*

The appellant Westbury asserts that the trial judge committed error in refusing his motion for a new trial. All of the grounds of such motion have been previously covered in specific questions heretofore decided. This exception is overruled.

What we have heretofore said disposes of all questions raised by the appellants, but in keeping with our invariable rule of *in favorem vitae*, we have carefully examined the record for any error affecting the substantial rights of the appellants, whether made a ground of appeal or not. We have found no such error. There are no errors apparent upon the record by which the appellants have been deprived of a fair and impartial trial.

The judgment of the lower court is affirmed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, JJ.,
concur.

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Howard L. Burns and Robert E. Vandiver, Complainants, v. F. Turner CLAYTON, Respondent. Howard L. BURNS and Robert E. Vandiver, Complainants, v. S. S. TISON, Jr., Respondent. Howard L. BURNS and Robert E. Vandiver, Complainants, v. L. C. WANNAMAKER, Respondent
(117 S. E. (2d) 300)

Proceeding on review of report of Board of Commissioners on Grievances and Discipline after hearing pursuant to rule on disciplinary procedure. The Supreme Court, held that evidence of professional misconduct warranted indefinite suspension of one attorney and the public reprimand of another, but as to third attorney evidence did not warrant a finding of professional misconduct.

Order accordingly.

1. **ATTORNEY AND CLIENT.**—In proceeding on review of report of Board of Commissioners on Grievances and Discipline, evidence warranted finding that one of the attorneys was guilty of professional misconduct justifying his indefinite suspension from the practice of law, that another attorney was guilty of professional misconduct justifying a public reprimand by court, but as to a third attorney evidence did not warrant a finding of professional misconduct. Rule on Disciplinary Procedure for Attorneys, §§ 9, 31, Vol. 7, Code 1952.
2. **ATTORNEY AND CLIENT.**—Review by Supreme Court of report of Board of Commissioners on Grievances and Discipline is not a criminal proceeding nor an appeal from judgment of lower court, and since Board's report is advisory only Supreme Court is in no wise bound to accept its findings of fact or to concur in its recommendation. Rule on Disciplinary Procedure for Attorneys, §§ 9, 31, Vol. 7, Code 1952.
3. **ATTORNEY AND CLIENT.**—Technical formality of allegation is not required in disciplinary proceeding and all that is requisite is that the respondent be clearly apprised of charges, that is, the facts upon which claim of misconduct is founded and that he be afforded reasonable opportunity for explanation and defense.
4. **PERJURY.**—Although crime of subornation of perjury is not consummated, the attempt to commit it is in itself a crime, being an act done with intention of preventing due course of justice.
5. **ATTORNEY AND CLIENT.**—Commission of crime by member of bar is not prerequisite to power of Supreme Court to disbar or suspend;

right to practice law is not an absolute one, and court that admitted lawyer to practice has inherent power to remove him from office when by clear and convincing proof it has been shown that his conduct has been such as to evidence moral turpitude or tends to bring courts and legal profession into disrepute.

6. ATTORNEY AND CLIENT.—Subornation of perjury, tampering with witnesses or otherwise practicing deception upon courts by fraudulent devices is gross misconduct in the perverting or obstructing of justice and warrants disbarment.
7. WITNESSES.—Where credibility of witness has been impeached by proof or imputation that he has made declarations inconsistent with what he has sworn to, an exception to the hearsay rule permits proof of his declarations, consistent with what he has sworn to, made on other occasions prior to existence of his relation to cause.
8. WITNESSES.—In disciplinary proceeding, where attorney in cross examination of witness vigorously impeached his credibility suggesting that his testimony concerning falsity of accident statement was not worthy of belief because it was given in consideration of money or favors granted by insurance company representative or someone else, testimony of truck owner to the effect that after accident witness had shown them copy of statement which he said was false, was admissible to corroborate such impeached witness' direct testimony.
9. ATTORNEY AND CLIENT.—Where Chairman of Board of Commissioners received a report of misconduct on part of attorneys, listened to several recordings and talked briefly with one of the witnesses in order to ascertain whether or not there was sufficient ground for appointment of one or more members of Commission to act as investigators, there was no error by Board on Grievance and Discipline in refusing to disqualify its chairman from conducting hearing on complaints against such attorney. Rule on Disciplinary Procedure for Attorneys, § 31(a), Vol. 7, Code 1952.

Messrs. Daniel R. McLeod, Attorney General, James S. Verner and William F. Austin, Assistant Attorneys General, of Columbia, for Complainants, cite: As to actions of the Chairman of the Panel not being such as to disqualify him: 48 C. J. S. 1059, 1061; 12 S. E. (2d) 701, 196 S. C. 186; 116 S. C. 77, 106 S. C. 855; 57 S. C. 142, 35 S. E. 537; 48 C. J. S., Par. 94. As to the Attorney General properly taking part in this matter: 49 S. C. 199, 27 S. E. 52; 78 S. E. 227, 94 S. C. 414; 159 S. E. 627, 161 S. C. 263. As to the new rules not giving to witnesses before a Hearing Panel

any immunity from prosecution for any perjury committed: 22 C. J. S. 1381; 42 S. E. (2d) 585, 210 S. C. 353. *As to the attempt of a person, especially an attorney, to procure another person to give false testimony being a crime:* 1 McCord 31, 1 McCord 349; 70 C. J. S., Perjury, Par. 80; 62 S. E. 406, 81 S. C. 290. *As to testimony of one witness, as to what another witness told him the day after the accident, being competent:* 69 S. E. (2d) 363, 221 S. C. 91; 137 S. C. 145, 134 S. E. 885; 58 Am. Jur. 463, 464. *As to the tape recordings being admissible:* 137 S. C. 145, 134 S. E. 885; 58 A. L. R. (2d) 1024, Annos.; 64 Nev. 514, 186 P. (2d) 351; 269 F. (2d) 80. *As to errors, if any committed, not being such as to affect the results nor warrant setting aside the findings of the Panel and Board:* 94 S. E. (2d) 886, 230 S. C. 164; 87 S. E. (2d) 287, 227 S. C. 138.

Messrs. S. S. Tison, Sr., of Bennettsville, and J. C. Hare and G. M. Howe, Jr., of Charleston, for S. S. Tison, Jr., cite: *As to Respondent not being guilty of subornation of perjury:* 240 N. C. 113, 81 S. E. (2d) 191; 63 S. E. 860, 5 Ga. App. 701; 92 S. E. (2d) 401, 244 N. C. 53; 100 S. E. (2d) 366, 247 N. C. 208, 63 A. L. R. (2d) 820; 28 S. E. (2d) 100, 223 N. C. 711; 70 C. J. S. 457, Perjury, Sec. 1a (1); 70 C. J. S. 548, Perjury, Sec. 79a; 70 C. J. S. 476, Perjury, Sec. 20a; 4 S. E. 793, 28 S. C. 18; 141 S. E. 165, 143 S. C. 63; 41 Am. Jur. 16, Perjury, Sec. 26; 41 Am. Jur. 18, Perjury, Sec. 30; 10 Ill. (2d) 357, 140 N. E. (2d) 825; 67 A. L. R. (2d) 827, Anno.; 159 S. E. 627, (S. C.). *As to what must be shown to prove conspiracy:* 53 S. E. 484, 73 S. C. 330. *As to actions of Commissioner being such as to disqualify him from sitting on the panel:* 6 S. E. (2d) 757, 192 S. C. 359; 126 S. E. 519; 131 S. C. 67, 133 S. E. 101, 134 S. C. 392; 10 Ill. (2d) 357, 140 N. E. (2d) 825. *As to admission of tape recording as evidence being improper:* 169 Pa. Super. 498, 83 A. (2d) 401; 48 So. (2d) 66; 256 P. (2d) 1033; 23 Cal. App. 513, 138 P. 971. *As to the admission of hearsay evidence being improper and the consideration of the same by the*

Panel and the Board prejudicial: 58 Am. Jur. 462, 465, Secs. 825, 831.

James P. Mazingo, III, Benny R. Greer and Archie L. Chandler, of Darlington, for F. Turner Clayton, cite: As to statements made by ignorant and irresponsible persons having very little probative value: 81 S. E. 290, 62 S. C. 406. *As to rule that even without corroborative proof, the presumption is in favor of the integrity of the Bar*: 89 S. C. 352, 71 S. E. 952. *As to statements made under oath*: 2 Hill (20 S. C. L.) 290; 39 Am. Jur. 499; 1 Am. Jur. 945, Sec. 18; 140 S. E. 670. *As to rule that in the orderly administration of justice the first and highest consideration is the right possessed by litigants to be heard before an impartial court*: 192 S. C. 359, 6 S. E. (2d) 757.

P. H. McEachin, Esq., of Florence, for L. C. Wannamaker.

Messrs. Samuel R. Watt, of Spartanburg, Thomas P. Stoney, of Charleston, John P. West, of Camden, and Edgar A. Brown, of Barnwell, as Amicus Curiae, cite: As to the dangers of admitting tape recordings as evidence: (Ala.) 79 So. (2d) 66; 169 Pa. Super. 498, 83 A. (2d) 401; 256 P. (2d) 1033; 23 Cal App. 513, 138 P. 971.

November 19, 1960.

Per Curiam.

After hearings pursuant to our Rule on Disciplinary Procedure, the Board of Commissioners on Grievances and Discipline filed with this court its final certified report finding each of the respondents guilty of professional misconduct and recommending that the respondents Clayton and Tison be permanently disbarred and the respondent Wannamaker publicly reprimanded. The matter is now before us on that report and the respondents' returns to our orders requiring them to show cause, respectively, why the report of the Board should not be confirmed and disciplinary orders issued accordingly.

Respondents are members of the bar of South Carolina, separately engaged in the practice of law in this state. Complainants, members of the Board of Commissioners on Grievances and Discipline appointed by its Chairman for the purpose of investigation and prosecution pursuant to Section 31 of the Rule on Disciplinary Procedure, instituted a separate proceeding against each respondent; and by agreement the three proceedings were heard together before a panel of three members of the Board appointed by its Chairman pursuant to Section 9 of the Rule. The panel, after lengthy hearings, found each of the respondents guilty of misconduct warranting disbarment, and so reported to the Board. Thereafter, pursuant to an order of this court, the Board furnished to each respondent a copy of the hearing panel's findings of fact and recommendations, and accorded to them and their counsel a full hearing prior to its action thereon.

The voluminous record, which we have carefully examined, convincingly reveals the following facts:

On the afternoon of Sunday, November 24, 1957, at a point on the Ruby-Hartsville highway in Chesterfield County near Knight's store and filling station, a collision occurred between an automobile owned and driven by one Hazel Miles and a truck, the property of one J. L. Mills, driven by Joel Mills. Hazel Miles and the five other occupants of his automobile were killed. On the same day, the respondent Clayton was employed as attorney on behalf of Oscar Miles to represent the estates and statutory beneficiaries of his two children killed in the accident, and to seek recovery for their alleged wrongful deaths, said employment to be on a contingent basis that was subsequently fixed at forty per cent of any recovery. Thereafter Mr. Clayton was employed, on the same basis, to represent the estates and the statutory beneficiaries of the four other occupants of the car. On the evening of the same day, as the result of information received in his investigation of the collision, Mr. Clayton went to the home of one Ray Tyner, near Knight's store. Following a conversation with Tyner, he returned next morning,

met Tyner and three other young men, Laverne, Robert and McDonald Gooden, whom Tyner had assembled, and he then took the four of them to his office, where he had each of them execute in affidavit form a statement as to the facts surrounding the collision and the manner of its occurrence. These statements, which purported to place the full blame upon the driver of the truck, who was the only surviving eyewitness, were false in that each represented the person making it as having been an eyewitness, whereas in truth and fact he was not. They were procured by Mr. Clayton through the assistance of Tyner; and the evidence fully justifies the finding of the Board that Mr. Clayton had knowledge of their falsity. Upon their having made these statements Mr. Clayton paid in cash twenty dollars each to Tyner and the three Goodens. Additionally, for his services in making his false statement, in procuring the Goodens to make similar ones, and in keeping them committed to such statements and prepared to testify accordingly, he agreed to pay Tyner ten per cent of whatever fee he, Clayton, might receive for his representation of the estates and the statutory beneficiaries of the deceased persons in their claims arising out of the fatal collision.

Tyner was an uneducated man, thirty-three years of age at the time of the hearing before the panel Commissioners, unable to read or write except to sign his name, egotistical, self-important, garrulous, avaricious and unscrupulous. That something of his character was or should have been known to Mr. Clayton at the time of their interviews in November, 1957, is suggested by the fact that in May of that year Mr. Clayton, representing Tyner's wife in an action to annul their marriage, had obtained in the court of common pleas for Chesterfield County a decree of annulment reciting that the marriage had been obtained "by misrepresentation and/or fraud of the defendant." Laverne Gooden, aged twenty, Robert, aged twenty-one, and McDonald Gooden, aged eighteen, were young men of little education, their schooling having ended with the ninth grade.

Shortly after having executed his statement before mentioned, Laverne Gooden told his father of its falsity; and later he went with his father to the sheriff of Chesterfield County (who died prior to the hearing of this matter), and made like report to him.

Some two weeks after the accident, an insurance carrier covering the liability of the truck owner retained the law firm of Spruill and Harris, of Cheraw, to represent its interest in the matter. About a week thereafter, as the result of a report made to his firm by an adjuster for the insurance company, Mr. Spruill requested of the Governor that an agent of State Law Enforcement Division (SLED) be sent into the area to make an investigation; and during the week before Christmas, 1957, Officer McKinnan of SLED came to Mr. Spruill's office and conferred with him. Early in January, 1958, as the result of a statement made to him by the sheriff, Mr. Spruill requested that Officer McKinnan be sent back to investigate further.

On January 6, 1958, Officer McKinnan obtained from Ray Tyner an affidavit to the effect that he had not seen the accident occur, being at the time engaged with Laverne Gooden in work on the latter's car between Tyner's house and Knight's store; that on the evening of November 24, 1957, Mr. Clayton had come to his home and asked him to give a statement concerning the accident, saying that he wanted a statement showing Tyner to have been an eyewitness, and that he would pay Tyner well for it; that he did not give Mr. Clayton a statement that night, but "saw the other boy so we decided that we would give him a statement since he was willing to pay us"; that next morning Mr. Clayton returned to Tyner's house and took Tyner and the three Goodens to his office, where he fixed up the statements and had them typewritten; that at this meeting Mr. Clayton insisted that they lower their estimate of the automobile's speed as it passed Knight's store; and that after they had signed the statements he gave each of them twenty dollars and told them that they would receive more later.

On the same day, January 6, 1958, Officer McKinnan obtained from Robert and McDonald Gooden affidavits to the effect that at Mr. Clayton's request they, together with Laverne Gooden and Ray Tyner, had gone with him to his office on November 25, 1957, and had there made statements as to what they knew of the accident; and that after their statements had been typewritten Mr. Clayton had given to each of them twenty dollars, saying that it was for their time consumed in coming to Cheraw with him. The statements given by Robert and McDonald Gooden to Officer McKinnan made no reference to the truth or falsity of the statements that they had given to Mr. Clayton on November 25. But before the hearing panel Robert testified that he had not seen the accident happen, he and McDonald Gooden being at the time of its occurrence inside the Knight store; that he had heard the crash, but had paid no particular attention to it until someone outside hollered that a truck had turned over up the road. With regard to the conference in Mr. Clayton's office on November 25, he testified that he told Mr. Clayton that he had not seen the collision, but that Mr. Clayton dictated the statements as he wanted them, and gave each of the boys a copy, telling each to read and remember it. Similarly, McDonald Gooden testified that he was inside the store and neither saw the collision nor heard the crash; and that at the conference on November 25 he had told Mr. Clayton that he had not seen the accident.

On the same day, January 6, 1958, Officer McKinnan obtained from Laverne Gooden an affidavit, a copy of which came into Mr. Clayton's possession under circumstances hereinafter related and was introduced in evidence in the course of the cross examination of Mr. Clayton at the panel hearing. In this affidavit Laverne Gooden averred that the falsity of the statement that he had signed in Mr. Clayton's office on November 25 was revealed to him when, upon his return home, his father read to him the copy that Mr. Clayton had given him; and that he went on December 22 to the sheriff and told him that the statement was wrong. Further,

that at the conference on November 25 Mr. Clayton, who had made a sketch of the vicinity of the accident, had wanted him to indicate thereon that his car was at a point where in fact it was not, and that he had told Mr. Clayton that he could not do that. The affidavit also related the payment of twenty dollars each to Tyner and the Goodens after they had signed their statements; and that although Mr. Clayton told them that the money was for their time lost from work such was not actually the case, as neither Laverne nor Tyner lost any working time, Robert had no regular job, and McDonald was a schoolboy. Before the hearing panel, Laverne Gooden testified that when the collision occurred he and Tyner were behind the Knight store, working on Laverne's car; that he did not see the accident and that it would have been impossible for him to see it from where he was; that he heard the impact of the collision and then ran to the scene; that when he signed the statement in Mr. Clayton's office he did not know its contents; that Tyner had told him that he was to give Mr. Clayton a statement just like the one that Tyner would give, saying that he had seen the accident occur; that his statement was fixed up like that of Tyner, Mr. Clayton dictating it; and that after his father had read the copy of it that he had taken home he admitted its falsity to his father and later to the sheriff. He testified that when the SLED officer questioned him later he told the truth, which was that he had heard, but not seen, the collision.

The news that Laverne Gooden had given a statement to Officer McKinnan was not long in reaching Mr. Clayton. On the day of its execution a Mrs. Campbell (who did not testify) took a copy of it to Dr. J. A. Jones, a druggist in Chesterfield, who promptly telephoned to Mr. Clayton. That night Mr. Clayton took Tyner and Robert and McDonald Gooden in his Car to Dr. Jones' store, entering through the rear door, and there he had them jointly execute a statement written by him and purporting to be sworn to before Dr. Jones as notary, to the following effect: that when they and

Laverne Gooden were in Mr. Clayton's office on November 25 someone asked who was going to take care of their expenses, and that Mr. Clayton told them all that he could not and would not pay them for making their statements; that all he wanted them to do was to tell the truth; that he then asked each to tell what he knew about the accident, in the presence of his secretary, who wrote down what each said, typed it, and they each then signed their respective statements and were given a copy; that Mr. Clayton gave them nothing and promised them nothing; that the next time they saw Mr. Clayton was on December 22, 1957, when they, with Laverne Gooden, went to his office to tell him that the sheriff had sent word that there would be an inquest; that at that meeting Laverne told Mr. Clayton that he had given the sheriff another statement; that Mr. Clayton again several times told them all to tell the truth; that on this occasion also Mr. Clayton neither paid nor promised any of them anything; that he did tell Tyner that he had some extra Christmas presents and would give him one, but could not give the others anything because they were under age; that then they all drove in Tyner's car to Mr. Clayton's house, and he gave Tyner a bottle of whiskey; and that Mr. Clayton "never did anything except tell us to tell the truth, and he never gave us any money or promised us any money or other reward."

On January 7, 1958, Mr. Clayton actively associated with him as counsel in the pending matters Mr. L. C. Wannamaker, of Cheraw, and Mr. Sidney S. Tison, Jr., whose law office was in Hartsville but who remained also a member of the firm of Tison and Tison, of which his father was senior partner, and the office of which was in Bennettsville. Mr. Clayton testified that he had never contemplated handling the entire matter alone, particularly in view of the complexities that would attend the administration of the six estates within the same family and the distribution of the funds expected to be received; and that he had, prior to January 6, told Mr. Wannamaker that he would like to as-

sociate him in the matter and had asked him to see if the firm of Tison and Tison would also come in with them. And Mr. Wannamaker testified that prior to January 6 Mr. Clayton had associated him in the case and agreed that he (Wannamaker) should have the privilege of inviting also his close friend Mr. Sidney S. Tison, Sr. But there is no suggestion in the record before us that Mr. Wannamaker's association in the matter was activated, or that Mr. Sidney S. Tison, Jr. was even approached with regard to participation in it, until January 7, 1958, the day after Mr. Clayton, having learned of Officer McKinnan's activity, had procured from Tyner and Robert and McDonald Gooden, in Dr. Jones' drug store, the joint statement before mentioned.

On the morning of January 7, Messrs. Clayton, Wannamaker and Tison, Jr., met with the latter's father in his office in Bennettsville. Mr. Clayton showed them the copy of the statement that Laverne Gooden had given to Officer McKinnan the day before; and they discussed it and the presence of SLED in the area. That evening Messrs. Clayton, Wannamaker and Tison, Jr., went in the latter's automobile to Tyner's house. They took with them a dictaphone operable by electric current from the car's cigarette lighter; and they recorded on it a conversation between Mr. Tison and Tyner in which the former read aloud the affidavit that Tyner and Robert and McDonald Gooden had given in the drug store the night before; and Tyner, having been sworn by Mr. Tison, reaffirmed as true the statements contained therein.

From this point Mr. Tison, Jr. actively participated in handling preparations for trial, including the taking of photographs, the preparation of drawings and a model of the locus, the interviewing of Tyner and Robert and McDonald Gooden, and rehearsal of their testimony. The record indicates that Tyner made frequent demands upon Mr. Clayton for money, and that the latter delegated to Mr. Tison the task of keeping Tyner satisfied. Mr. Clayton denied having paid Tyner anything himself except that on two occasions after Tyner's house had burned he paid him twenty dollars.

Denying that he had ever instructed Mr. Tison to pay Tyner anything, he admitted that he knew that Tison was paying so that he would be available if and when the cases should come to trial; and he admitted that early in 1958, after Tyner had asked him to agree to pay him ten per cent of what he (Mr. Clayton) would get out of the matter, he had told Tyner, in order to get him out of his office, that it would be all right and he would take care of it. It appears further from Mr. Clayton's testimony that at the conclusion of a conference in the office of Mr. Tison, Jr., at which were present Mr. Clayton, Mr. Tison, Jr., Ray Tyner, and two of the Gooden boys, Tyner ushered the Goodens out, returned, and suggested that both Mr. Clayton and Mr. Tison agree to pay him ten per cent, to which Mr. Tison had replied that he was not going to get any of his part of it.

All claims arising out of the fatal accident of November 24, 1957, were settled without trial. The settlement, agreed to on January 9, 1959, and consummated in the latter part of the following month, was in the amount of \$75,000, which was deposited in Mr. Wannamaker's personal account and disbursed by him. On February 25, Mr. Clayton and Mr. Tison met with Mr. Wannamaker in his office, and he delivered to each of them his check in the amount of \$10,000, representing their respective shares in the total fee of forty per cent, or \$30,000.00, of the recovery. On this occasion Mr. Wannamaker inquired of Mr. Tison, who had been taking care of expenses as they arose, what his share was, to which Mr. Tison replied that \$225.00 was as near as he could estimate it; and thereupon he paid Mr. Tison that amount. Previously, on July 24, 1958, he had paid to Mr. Tison \$300.00 as contribution to the general expenses of the case. Mr. Tison having stated, in the conference of February 25, 1959, that there were some unpaid bills, including money owing Tyner, Mr. Wannamaker testified that after he had paid Mr. Tison \$225.00 as his share he remembered that he had personally engaged a Mr. Hoover, an engineer of Cheraw, and had sent him to Mr. Tison; and that he then

asked Mr. Tison if the Hoover bill was included in his estimate of unpaid expenses, to which Mr. Tison had replied that he had forgotten about Mr. Hoover. Attempt was then made, without success, to reach Mr. Hoover by telephone and ascertain the amount of his bill; and it was agreed that \$150.00 would be a proper charge, and that if he should approve it, Mr. Tison would pay it and Mr. Wannamaker would send his share, \$50.00, to Mr. Tison, which he later did. Mr. Wannamaker testified, without contradiction, that he did not know how much Tyner was to be paid, and that he did not inquire as to what were items of expense to which he contributed.

Mr. Tison testified that when Tyner brought up, in his presence, the matter of his contributing toward the payment to him of ten per cent, he first told Tyner that he would not get any of his share, but later told him that he would contribute on the payment to him of ten per cent of what Mr. Clayton would get. Mr. Tison testified that after the conference with Mr. Wannamaker on February 25, 1959, he asked Mr. Clayton to find out from Tyner how much had been paid him, he (Tison) being under the impression that Tyner had receive about \$400.00; and that Mr. Clayton then called Tyner and agreed with him on a further payment of \$300.00 and told him to get it from Mr. Tison. Mr. Tison also testified that to the best of his recollection Tyner was paid at least \$1,000 and probably nearer \$1,100.00.

Mr. Spruill's first contact with Tyner was a day or so after Officer McKinnan's second visit, early in January, 1958, when he received a telephone call from one who introduced himself as Ray Tyner and said that he was calling from a filling station in Cheraw and that he wanted to talk with Mr. Spruill there. Mr. Spruill and his partner, Mr. Harris, then went to the filling station where Tyner's car was parked; and as the result of that and several later conversations with Tyner, Mr. Spruill and Mr. Harris took Tyner, on January 30, 1958, to the office of the circuit solicitor in Darlington. Tyner there related to the solicitor

what he had told Messrs. Spruill and Harris; and the next day, at the solicitor's request, the Chief of SLED sent to the solicitor a pocket-size tape-recording device, which counsel in their arguments before us refer to as a miniphone. On the night of January 31, Mr. Spruill and Mr. Harris again took Tyner to the solicitor's office and, the solicitor having instructed him as to its use, the miniphone, loaded with a three-hour tape, was delivered to Tyner. Thereafter Tyner on several occasions used this and another similar miniphone for the purpose of recording conversations between himself and Mr. Clayton and Mr. Tison concerning matters pending between him and them.

Portions of the tape-recordings so made by Tyner were played back during the course of the panel hearings. There were also introduced in evidence before the panel transcriptions of certain parts of them; and we note some discrepancies between two versions of the same part as transcribed by two disinterested witnesses. During argument before us these tape-recordings were played back, almost in their entirety, through a loud-speaker; and so heard, except for a few disconnected words here and there, we found them unintelligible. For this reason we have disregarded the tape-recordings and the transcriptions of them, and our decision in the instant matter has in nowise been influenced by them.

In our consideration of the record here we have amply discounted the testimony of Ray Tyner; and we have not overlooked the immaturity of the three Goodens, their evident acquiescence in being led into falsehood, and the vigorous attack upon their character by respondents' able counsel in scathing cross examination of them before the hearing panel and in argument before us. But despite these considerations, and apart from the tape-recordings before referred to, we are convinced beyond doubt from the record before us that the respondents Clayton and Tison were guilty of grave professional misconduct; the former in deliberately procuring false statements from prospective witnesses and in rewarding

his accomplice, Tyner, with a portion of his fee; the latter, after the false statements had been thus obtained, and with knowledge that Laverne Gooden had sworn to Officer McKinnan that they were false, by actively furthering the continuance of the respondent Clayton's professional misconduct, and by knowingly participating in the payment to Tyner of a portion of the fee.

The evidence does not, in our opinion, warrant a
1 finding of professional misconduct on the part of the respondent Wannamaker. His association in the matter appears to have been for the purpose of exploring the question whether there might be liability, along with that of the owner of the milk truck, on the part of a large corporation engaged in the processing and distribution of milk, and also for the purpose of handling the complicated procedure and accounting incident to the administration of the estates of the six persons who had been killed in the accident. He did accompany the other respondents on their visit to and interview with Tyner on the night of January 7, 1958; but he does not appear otherwise to have participated with them in the actual preparations for trial, nor does it appear that he knew of the agreement between them and Tyner for payment of a part of the fee to the latter. The matter of paying expenses incident to investigation and preparation for trial had been left with Mr. Tison; and, so far as the record shows, Mr. Wannamaker had no reason to question the propriety of his disbursements or to require an accounting before making his contribution to them.

Counsel for the respondents Clayton and Tison earnestly contend that the findings and recommendations of the Board of Commissioners should be disregarded and the charges against these respondents dismissed; and in support of such contention they urge the following grounds:

1. That the Board erred in finding these respondents guilty of subornation of perjury, the complaints against them not having charged that offense and the evidence not warranting the finding that such offense had been committed.

2. That the Board erred in finding that the conduct of these respondents was in violation of the oath of office taken by them upon their admission to the bar of this State, the complaints not having so charged and the evidence not so warranting.

3. That since the complaints charged conspiracy and the Board acquitted the respondents of that charge, the Board's finding of misconduct was unsupported by the evidence.

4. That the evidence was insufficient to support the Board's finding that these respondents were guilty of violation of Canons 15, 32, 34 and 42 of the Canons of Ethics adopted by the American Bar Association and by this court.

5. That the Chairman of the Board should have disqualified himself.

6. That the miniphone tape-recordings, being fragmentary and unintelligible, should have been excluded from evidence before the hearing panel and from consideration by the Board.

7. That the admission of certain testimony of J. L. Mills, the owner of the milk truck, was erroneous and prejudicial.

The fallacy underlying these contentions is that they

2 overlook the following fundamentals: that this is not a criminal proceeding nor an appeal from the judgment of a lower court; that the Board of Commissioners on Grievances and Discipline are officers of this court, commissioned and charged with the duty of investigating alleged misconduct on the part of their fellow members of the bar of this State and of reporting to this court the proceedings of their inquiry, and their findings and recommendations; that the Board's report is advisory only, this court being in nowise bound to accept its findings of fact or to concur in its recommendations; and upon this court alone rests the duty and the grave responsibility of adjudging, from the record, whether or not professional misconduct has been shown, and of taking appropriate disciplinary action thereabout.

The complaint against the respondent Clayton charged that he attempted to procure Tyner and the three Goodens

to give perjured testimony to the effect that they had witnessed the accident; that thereafter, in order to effectuate and establish the perjury thus originally conceived, he conspired with the respondents Tison and Wannamaker with a view to securing false statements from Tyner and Robert and McDonald Gooden to contradict a statement given by Laverne Gooden to an officer of South Carolina Law Enforcement Division; and that, pursuant to said conspiracy, the three respondents held meetings with Tyner and Robert and McDonald Gooden and paid them various sums of money and for his assistance in holding Robert and McDonald Gooden to their perjured testimony they agreed to pay and did pay Tyner a fee contingent on recovery, being ten per cent of the fee to be received by the respondent Clayton. The complaint against the respondent Tison charged him with the same conspiracy and the same acts in furtherance of it. The complaint in each case charged that the alleged acts of the respondent violated Canons 15, 32, 34 and 42 of the Canons of Professional Ethics of the American Bar Association, and were such as to pollute the administration of justice and bring the courts and the legal profession into disrepute.

That the complaints characterized the conduct of these respondents as conspiracy and the Board in its report characterized it as subornation of perjury, is a matter of no consequence in a proceeding of this kind, for such allegation and such finding were conclusional, not factual. For that reason, as well as because the Board's report is merely advisory, it matters not that the Board was in error in viewing respondents' conduct as constituting subornation of perjury. We note that the offense consists of two essential elements, *viz.*: (1) procuring or inducing one to commit perjury, and (2) his commission of perjury, *State v. Sailor*, 240 N. C. 113, 81 S. E. (2d) 191; *Hammer v. United States*, 271 U. S. 620, 46 S. Ct. 603, 70 L. Ed. 1118; 41 Am. Jur., Perjury, Section 74; and that the second of these elements is lacking here because it does not appear that the

witnesses allegedly suborned actually swore falsely "in taking any oath required by law, administered by any person directed or permitted by law to administer such oath", Code 1952, Section 16-203.

Technical formality of allegation, as in an indictment, is not required in proceedings such as the present. All that is requisite to their validity is that the respondent be clearly apprised of the charges, *i. e.*, the facts upon which the claim of misconduct is founded, and that he be afforded reasonable opportunity for explanation and defense. 5 Am. Jur., Attorneys at Law, Section 291; *Randall v. Brigham*, 7 Wall. 523, 74 U. S. 523, 19 L. Ed. 285; *Herman v. Acheson*, D. C., 108 F. Supp. 723; *Phipps v. Wilson*, 7 Cir., 186 F. (2d) 748. The complaints here, plainly alleging the facts constituting the claimed misconduct, were served upon the respective respondents on May 22, 1959, and each of them duly answered; thereafter they were duly notified that the hearing before the panel of three Commissioners would be held on June 16, 1959; at that hearing they attended and heard the evidence against them, and their counsel cross-examined the complainants' witnesses; that hearing lasted through June 18, and thereupon a recess was ordered until August 3 to enable counsel to obtain and study the reporter's transcript of the proceedings before offering evidence for the respondents; and on August 3 the hearing was resumed and lasted until midday of August 5. As before stated, respondents and their counsel were afforded the opportunity to appear, and did appear and were heard, before the full Commission prior to its action upon the panel report; and in opposition to the report of the full Commission they have been fully heard by this court. The requirements of due process have been satisfied. *Ex parte Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552.

Although the crime of subornation of perjury was not consummated, the attempt to commit it was in itself a crime, being an act done with the intention of preventing the due course of justice. *State v. Holding*, 1

McCord's Law 31, 12 S. C. L. 31. In *State v. DeWitt*, 2 Hill's Law, 282, 20 S. C. L. 282, 27 Am. Dec. 371, the defendants were indicted for a conspiracy to destroy the last will of a testator and thereby defraud the devisees. The court, declaring that all conspiracies to injure others and obstruct justice by the suppression or fabrication of evidence are indictable, said: "Attempts to suborn a witness to commit perjury or to prevent his giving evidence are offences against public justice; and there can be no well founded reason why the fabrication of evidence not involving perjury, or the destruction and suppression of that which is good, should not equally be so; they are alike calculated to pervert the public justice of the country, and to do individual injustice." And see also *State v. Cole*, 107 S. C. 285, 92 S. E. 624, where it was held that an agreement between the defendant in a criminal case and a prospective witness for the prosecution, whereby the latter, for fifteen dollars paid to him, would testify falsely in the defendant's behalf, was an indictable conspiracy.

But commission of a crime by a member of the bar 5, 6 is not prerequisite to the power of this court to disbar or suspend. The right to practice law is not an absolute one; as an officer of the court the lawyer's tenure is during good behavior; and the court that admitted him to practice has inherent power to remove him from office when by clear and convincing proof it has been shown that his conduct has been such as to evidence moral turpitude or tend to bring the courts and the legal profession into disrepute. *State v. Jennings*, 161 S. C. 263, 159 S. E. 627. As was said by the Nevada court, speaking through Justice Merrill in a matter having much in common with that now before us: "It is clear that subornation of perjury, tampering with witnesses or otherwise practicing deception upon a court by fraudulent devices is gross misconduct in the perverting or obstructing of justice and warrants disbarment." *In re Wright*, 69 Nev. 259, 248 P. (2d) 1080, 1083.

In effect, all contentions of the respondents Clayton and Tison have been disposed of by what has already been said. We shall, however, discuss briefly those addressed to the Board's finding that these respondents had violated their oaths of office and certain canons of ethics, to the admission of certain evidence, and to the alleged disqualification of the Chairman of the Board.

The oath taken by the respondents Clayton and Tison upon their admission to the bar of this State (in 1950 and 1948 respectively) was, in substance, that each was duly qualified according to the Constitution of this State to exercise the duties of the office of attorney at law; that he would, to the best of his ability, discharge the duties thereof and preserve, protect and defend the Constitution of this State and of the United States; and that he had not engaged, and would not during his term of office engage, in a duel. Maintenance of a proper standard of professional conduct was the first and highest duty that these respondents owed to their clients, to the courts, to their brethren at the bar, and to the people of this State. It was a duty required by the covenant to which they had bound themselves by their oaths of office.

Among the Canons of Professional Ethics adopted by the American Bar Association, Nos. 15, 32, 34 and 42 contain these declarations:

15. "The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane."

32. "No client * * * nor any cause * * * however important, is entitled to receive, nor should any lawyer render any service or advice involving disloyalty to the law * * *. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation."

34. "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."

42. "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

These canons, which we adopted in 1956 as a rule of this court, represent the consensus of the bar on the moral standard that lawyers in their practice should follow and uphold. In *Herman v. Acheson*, *supra*, the court said [108 F. Supp. 726] :

"Codes of ethics adopted by bar associations, of course, have no statutory force. They are indicative, however, of and reflect the attitude of the profession as a whole upon those courses of conduct which they frown upon and interdict, and they are commonly regarded by bench and bar alike as wholesome standards of professional ethics. The practice of law is a profession and not a trade."

The record here does not seem to involve Canon 42, since there is no evidence of any agreement between the respondent Clayton and his clients concerning payments to Tyner by the former or reimbursement therefor by the latter. But in our judgment it does clearly and convincingly show violation of the other three before mentioned, by the respondent Clayton directly and by the respondent Tison in the role of accessory.

Before the hearing panel, the respondents objected to admission of testimony of Mr. J. L. Mills, the owner of the truck, to the effect that on the day after the accident Tyner had shown him a copy of the statement that he, Tyner, had given to Mr. Clayton that morning, and had then told him that said statement was false and had been worded by Mr. Clayton to suit his purpose, with knowledge of its falsity. Here it is contended that there was prejudicial error in the admission of such testimony and in its consideration by the Board in its review of the panel's report.

- Where the credit of a witness has been impeached by
7 proof or imputation that he has made declarations
inconsistent with what he has sworn to, an exception

to the hearsay rule permits proof of his declarations, consistent with what he has sworn to, made on other occasions prior to the existence of his relation to the cause. For example, in *Lyles v. Lyles*, 1 Hill's Eq. 76, 10 S. C. Eq. 76, where the issue was whether in 1817 J. was alive, D., a witness for the defendants, testified that he had seen J. in Mississippi in that year, and that he was at that time alive and well. Another witness, Lucy Farr, testified that she had been present when one Elizabeth Brown had inquired of D. if he had recently seen J., and that in that interview D. at first did not appear to have answered in the affirmative, but later, after a private interview with Elizabeth Brown, D. had stated that he had seen J. The witness Lucy Farr testified further that Elizabeth Brown had told her that she, Elizabeth, was to be well paid by one of the defendants if she could find a person who would swear that J. was alive at the time in question, and that D. would be well paid by said defendant for so testifying; and that the witness did not believe that D. had ever seen J., but believed that he had been prevailed upon by Elizabeth to swear that he had. The defendants then offered one Nathan Vincent to prove that he had heard D. say, in the latter part of 1817, after his return from the Mississippi, that he had seen J.; and on appeal it was held that this testimony should have been admitted.

In the instant matter, respondents in their cross examination of Tyner vigorously impeached his credibility, suggesting, among other things, that his testimony concerning the falsity of the statement procured from him by Mr. Clayton on November 25 was not worthy of belief because it was given in consideration of money or promises or favors given to him by a representative of the insurance company, or by others concerned with this proceeding, and because it was in conflict with statements previously made by him. Mr. Mills' testimony as to a declaration made to him by Tyner prior to Tyner's relation to the instant matter, and indeed prior to Tyner's affidavit to McKinnan, was properly admitted as corroborative both of that

affidavit and of Tyner's testimony. *Lyles v. Lyles, supra; State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661. We may add that we would reach the same conclusion from the other evidence in this record without regard to Mr. Mills' testimony.

We do not agree with the contention that the Board
9 of Commissioners erred in refusing to disqualify its Chairman upon the ground that prior to the commencement of the hearings he had participated in the investigation of the complaints, had listened to certain of the miniphone recordings, and had discussed certain of the evidence with the witness Tyner. Section 31(a) of the Rule on Disciplinary Procedure reads as follows:

"Whenever, from sources deemed by him reliable, the chairman of the Commission learns of an attorney (who is licensed to practice in South Carolina) engaging in practices in violation of his duty as such attorney, and the Chairman comes to the conclusion that an investigation should be made, he shall designate one member of the Commission to act as an investigator. The member so designated shall investigate these reported violations of duty, and for this purpose he may call to his assistance such public investigating agencies as he may think proper. After making such investigation, should the investigator come to the conclusion that a complaint (as described in section 7 hereof) should be made against the attorney investigated he shall file such in his official capacity and be responsible for the prosecution thereof to a conclusion."

The record here discloses that the Chairman, having received a report of misconduct on the part of the respondents, listened to one of the recordings and talked briefly with Tyner in order to ascertain whether or not there was sufficient ground for the appointment of one or more members of the Commission to act as investigators. There is no suggestion that he did more than that; in order to discharge intelligently his duty under the section of the Rule just quoted, he could hardly have done less.

The Chairman of the Board of Commissioners, a distinguished lawyer of unimpeachable integrity, was also a member of the hearing panel, over which he presided. When respondents' counsel moved before the Board of Commissioners for his disqualification he stated that the preliminary inquiry before mentioned had not resulted in his forming any opinion as to respondents' guilt or innocence. The Board ruled that he was not disqualified, and we find no error in such ruling. Of the fourteen members of the Board of Commissioners (one from each judicial circuit), ten sat to consider the report of the hearing panel; two, the complainants herein, were disqualified under the rule; the Commissioner from the judicial circuit in which the respondents reside disqualified himself voluntarily, and so also did another Commissioner, whose firm had been of counsel in the litigation out of which the charges against the respondents arose. The ten Commissioners who sat, and whose report is now under review, were unanimous in finding the respondents guilty of misconduct; one stated that he considered the penalties recommended by the others too severe, and that therefore he could not join in that recommendation. No prejudice has been shown. In *Phipps v. Wilson*, *supra*, upon similar contention against the procedure under the disciplinary rule of the Illinois Supreme Court, whereby committees of the Chicago Bar Association as commissioners of that court had investigated charges of misconduct and had recommended disbarment, the court held that no substantial question under the due process clause of the Federal Constitution was raised. It was there pointed out, as we have emphasized here, that such commissioners are merely agents of the court for the purpose of gathering and reporting the evidence, and that their recommendations are purely advisory.

The return of the respondent L. C. Wannamaker is adjudged sufficient, and the charges against him are dismissed.

Because this matter is the first of its kind under the recently adopted Rule on Disciplinary Procedure, and because

of the laxity and inefficiency of procedures heretofore existing for dealing with professional misconduct, we feel justified in not invoking the extreme penalty of disbarment in the case of the respondent Clayton, or the penalty of indefinite suspension in the case of the respondent Tison. Our leniency is not to be understood as implying that their misconduct does not warrant such penalties; rather it is intended as a warning that it may not be expected in the future, and as an expression of hope that the penalty that we now impose upon them respectively will suffice to cause each to understand and uphold hereafter that standard of conduct demanded by the very nature of the legal profession and its relationship to the courts and the public.

The respondent F. Turner Clayton is indefinitely suspended from the practice of law in this State. He shall forthwith surrender to the clerk of this court the certificate heretofore issued by this court admitting him to practice.

For his acts of misconduct before mentioned the respondent S. S. Tison, Jr., stands publicly reprimanded by this court.

Let this order be published with the opinions of this court.

And it is so ordered.

17717

Lillian H. FLYNN, Administratrix of the Estate of Mary Effie Hoffman, Deceased, Appellant, v. CAROLINA SCENIC STAGES and Cecil Adell Dixon, Respondents

(117 S. E. (2d) 364)

Action against the bus company and the bus driver, by administratrix for wrongful death which occurred when decedent, who was in good health but had impaired hearing, and who had been a passenger and had just alighted from bus at time when it was raining, was struck by the front of the bus. From order of the Common Pleas Court, Chester

County, J. Woodrow Lewis, J., granting nonsuit at conclusion of plaintiff's testimony, administratrix appealed. The Supreme Court, Oxner, J., held that where shoulder of road to which decedent had alighted was wet dirt and perhaps slippery, evidence as to distance in front of bus that decedent crossed, and estimates of time which bus was stopped, varied, questions of negligence, contributory negligence, and proximate cause were for jury.

Reversed and remanded for new trial.

1. **APPEAL AND ERROR—CARRIERS.**—In determining whether there was error in granting nonsuit in wrongful death action, the testimony and all reasonable inferences to be drawn therefrom must be considered in the light most favorable to the plaintiff, any conflict in the testimony must be resolved in her favor, and if the inferences properly deducible from the evidence were doubtful, or tended to show both the driver and decedent guilty of negligence, and there was a fair difference of opinion as to whose act produced the injury as a direct and proximate cause, granting of nonsuit would be erroneous.
2. **CARRIERS.**—Although the relation of passenger and carrier ordinarily ends when passenger steps from a bus into a reasonably safe place on a public highway, the carrier still owes duty of exercising ordinary care to see that after alighting safely passenger is not in such a position or situation as to be imperiled by the starting up of the bus, and the care to be exercised toward an alighting passenger must be proportionate to the degree of danger inherent in the particular passenger's personal situation and his obvious needs.
3. **CARRIERS.**—In action against bus company and bus driver for wrongful death which occurred when decedent, who was an 81-year-old widow, about five feet, seven inches tall, in good health but with impaired hearing, and who had been a passenger and had just alighted from the bus at time when it was raining, was struck by the front of the bus, where shoulder of road to which decedent had alighted was wet dirt and perhaps slippery, and evidence as to distance in front of bus that decedent crossed, and estimates of time which bus was stopped, varied, questions of negligence, contributory negligence and proximate cause, were for jury. Motor Carrier Safety Regulations, § 2.10, Vol. 7, Code 1952.
4. **EVIDENCE.**—Testimony of witness to accident wherein passenger, who had just alighted from bus, was struck by the front of the bus, that passenger was so close to the front of the bus that driver could not have seen her, was a mere conclusion which the jury

would be at liberty to disregard, in action by passenger against bus company and bus driver for personal injuries.

5. AUTOMOBILES.—Statute providing that every pedestrian crossing a roadway at any other point than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway, was inapplicable to circumstances where passenger who had alighted from bus proceeded to cross roadway in front of bus at time when bus was standing still. Code 1952, § 46-435.

Strickland & Hardin and Gaston & Gaston, of Chester, for Appellant, cite: As to a motor carrier owing a duty to its passengers to exercise the highest degree of care for their safety: 225 S. C. 253, 81 S. E. (2d) 788. As to duty to exercise the highest degree of care extending to allow the passenger, who has alighted, to reach a place of safety: 58 A. L. R. 932. As to it being a question for the jury, under all the circumstances of the case, whether the passenger was discharged at a safe place so that the carrier no longer owes him the duty of the highest degree of care for his safety: 247 Minn. 368, 77 N. W. (2d) 433, 58 A. L. R. (2d) 921; (Mo.) 269 S. W. (2d) 101; 360 Pa. 464, 62 A. (2d) 56. As to negligence on part of bus driver in starting up bus before discharged passenger had reached a place of safety: 58 A. L. R. (2d) 932; (Mo.) 269 S. W. (2d) 101; 247 Minn. 368, 77 N. W. (2d) 433, 58 A. L. R. (2d) 951. As to Plaintiff's intestate not being guilty of contributory negligence: 182 Va. 796, 3 S. E. (2d) 581. As to facts proven by Plaintiff being sufficient to entitle Plaintiff to jury trial: 229 S. C. 39, 91 S. E. (2d) 552; 219 S. C. 360, 65 S. E. (2d) 468; 228 S. C. 577, 91 S. E. (2d) 276; 165 S. C. 26, 162 S. E. 596; 196 S. C. 259, 13 S. E. (2d) 137.

Messrs. Cooper & Gary, of Columbia, and Hemphill & Hemphill, of Chester, for Respondents, cite: As to evidence not being sufficient to justify the submission of the case to the jury: 60 C. J. S. 942, Motor Vehicles, Sec. 386; 98 S. E. (2d) 761, 231 S. C. 315; 91 S. E. (2d) 254, 228 S. C. 550. As to the deceased being a pedestrian, and not a

passenger: 133 Ga. 573, 66 S. E. 902; 106 S. E. 822, 811 N. C. 221; 263 N. W. 577, 219 Wis. 541; Words & Phrases, 31 A. 47; 13 C. J. S. 1070, Carrier's, Sec. 565; 222 Pac. 950, 97 Okla. 19; 73 S. E. (2d) 867; 171 N. W. 658, 169 Wis. 38; 133 Conn. 408, 155 Atl. 721; 44 Ohio App. 549, 182 N. E. 596; 147 Ore. 588, 34 Pac (2d) 616. *As to deceased being guilty of contributory negligence*: 296 A. L. R. 723; 223 F. (2d) 839; 91 S. E. (2d) 254, 228 S. C. 550.

December 1, 1960.

OXNER, Justice.

This is an action to recover damages for the alleged wrongful death of Mrs. Mary Effie Hoffman, who was run over by a bus of the Carolina Scenic Stages in which she had been a passenger and from which she had alighted just prior to being struck by the front of the bus. The bus was driven by Cecil Adell Dixon who was joined as a party defendant along with the bus company. At the conclusion of the plaintiff's testimony, the Court granted a motion by defendants for a nonsuit upon the grounds (1) that there was no proof of negligence on the part of defendants, and (2) that plaintiff's intestate was guilty of contributory negligence as a matter of law. From this order of nonsuit, the plaintiff has appealed. The testimony discloses the following facts:

Decedent, a widow 81 years of age, resided with a daughter in Columbia. She enjoyed good health but her hearing was impaired. She had a son living at or near Edgemoor, a small village in Chester County, whom she visited quite frequently. On May 16, 1958, she left Columbia on bus of the Carolina Scenic Stages to visit her son. The bus, traveling in a northerly direction, arrived at Edgemoor about 4:30 in the afternoon. It stopped at a point on the highway diagonally across the road from her son's home with the right wheels on the dirt shoulder and the left wheels on the asphalt surface of the road. The weather was stormy, the wind was

blowing and it had started to rain. To reach her son's home it was necessary for decedent to cross the highway. There was no cross-walk at this place. The family was expecting her. Her daughter-in-law, a great-grandson about 13 years of age, and a maid were on the front porch.

When the bus stopped, the driver left the engine running, opened the door and took decedent's suitcase and set it down on the dirt shoulder of the road near the front of the bus. He then assisted her in getting off. Just prior to this, decedent's daughter-in-law had told the 13 year old boy to go and get his great-grandmother's suitcase. He arrived just about the time decedent had got off the bus. According to his testimony, the driver told her "to go back of the bus and look up and down the road before you cross." Decedent, who was then standing near the front of the bus, said or did nothing to indicate that she heard this admonition. The boy hurriedly carried the suitcase to the porch, a distance of about 60 feet, whereupon decedent's daughter-in-law told him to go back and help his great-grandmother across the road. When decedent got out of the bus, a Negro passenger got on and the driver closed the door. After the decedent looked "up the road", "down the road", and "into the windshield", she proceeded to go across the road in front of the bus. When she was about the center of the bus, it "suddenly lunged forward and knocked her down." She died almost instantly. The bus proceeded a distance of about 80 feet before it stopped. When the accident occurred, the young boy, who was returning to assist his great-grandmother, had reached a point near the western side of the highway.

The decedent was about five feet, seven inches tall. There was some variation in the testimony as to how closely she passed in front of the bus. One witness said she was a foot in front of it, another said she held her hand on the bus as she passed around it but did not "stoop down". The colored maid who was on the front porch testified on cross examination that the decedent was "stooping down a little bit" and in her opinion, the driver could not have seen her. Several

witnesses said the bus was stopped for a period of about a minute but, of course, this was only a rough estimate.

It is well settled that in determining whether there
 1 was error in granting the nonsuit, the foregoing testimony and all reasonable inferences to be drawn therefrom must be considered in the light most favorable to the plaintiff and any conflict in the testimony must be resolved in her favor. If the inferences properly deducible from the evidence are doubtful, or if they tend to show both the driver and decedent guilty of negligence, and there may be a fair difference of opinion as to whose act produced the injury as a direct and proximate cause, then the case should have been submitted to the jury. *Green v. Bolen*, S. C., 115 S. E. (2d) 667, and cases therein cited.

Before discussing the testimony, it may be helpful
 2 to determine the degree of care owed by a motor carrier to a passenger alighting from one of its buses. The relation of passenger and carrier ordinarily ends when the passenger steps from a bus into a reasonably safe place on a public highway. 13 C. J. S., Carriers, § 565; 10 Am. Jur., Carriers, Section 1008. But it does not follow that the carrier is then wholly discharged of any duty whatsoever to such passenger. It still owes him the duty of exercising ordinary care to see that after alighting safely he is not in a position or situation as to be imperiled by the starting up of the bus. *Patton v. Minneapolis St. Ry. Co.*, 247 Minn. 368, 77 N. W. (2d) 433, 58 A. L. R. (2d) 921; *Mayor v. St. Louis Public Service Co.*, Mo., 269 S. W. (2d) 101. The care which must be thus exercised toward an alighting passenger must be proportionate to the degree of danger inherent in the particular passenger's personal situation and to his obvious needs.

In *Nygren v. Minneapolis St. Ry. Co.*, 241 Minn. 485, 63 N. W. (2d) 560, 562, the plaintiff, a 73 year old widow, after alighting from a bus was struck by the front of it as she proceeded to cross the street. She brought an action against

the carrier to recover damages for personal injuries sustained. One of the defendant's witnesses testified that the plaintiff crossed "in front of the bus only one foot from its front, where she would have been in a blind spot to the driver." The driver said he never saw plaintiff after she alighted from the bus. In holding that the statutory right of way rule did not apply and that there was no error in refusing defendant's motion for a directed verdict, the Court said:

"While the plaintiff here was crossing the street at a place other than a regular intersection, she was not, necessarily, negligent in doing so. The plaintiff, as pedestrian, and the motorman bore equal duties in the use of the street here; namely, the exercise of ordinary care under the circumstances. The motorman was bound to maintain a lookout for people where he ought to know they are likely to be. This is especially true with reference to passengers discharged from his bus when he is so situated, either because of his own size, the manner in which the motorbus is constructed, or the location where he has stopped it, that he cannot clearly see the street ahead to determine whether it is safe to proceed. Ordinary or reasonable care under those circumstances requires that he make such an observation as will enable him to proceed safely or give adequate and timely warning of his intention to proceed so that those who might be endangered by his movements may escape or avoid the dangers incident thereto. The plaintiff, in crossing the street as she did here, was required to exercise due care for her own safety and yield the right of way to moving automobiles, streetcars, and buses approaching on the street. At the time in question, the defendant company's motorman, having stopped and discharged the passengers where he did, had no immediate greater right upon the street or greater right to its use than did the plaintiff. Each owed the same duty—the exercise of ordinary care under the circumstances."

Assuming, as contended by defendants, that after
3, 4 decedent alighted from the bus, she was in a place of
safety and no longer had the status of a passenger,

we still think the Court erred in granting a nonsuit. We would not be justified in concluding that there was no testimony reasonably warranting an inference of negligence on the part of the bus driver. Neither can we say as a matter of law that decedent was guilty of contributory negligence. It may be reasonably inferred that the driver violated Section 2.10 of the safety regulations issued by the Public Service Commission, Volume 7, page 771 of the 1952 Code, which provides: "No motor vehicle shall be set in motion until due caution has been taken to ascertain that the course is clear." It is for the jury to say whether due to her impaired hearing the decedent heard the driver's admonition to go around the back of the bus and after giving this admonition whether the driver was negligent in not thereafter observing the movements of decedent, particularly in view of her age. Since it was raining and the dirt shoulder of the road was wet and perhaps slippery, a jury could reasonably conclude that the driver should have considered the possibility that decedent might cross in front of the bus. A factual issue is also presented as to whether the driver should have seen the deceased as she passed the side door of the bus and went around in front of it. His failure to do so may have been due to the fact that he was collecting the fare from the Negro passenger who had just gotten on the bus, or there may have been some other reason. We simply have no explanation in this record for the sudden start of this bus as the decedent was walking around in front of it. If there were circumstances justifying a failure to see her, they should be known to the driver, but he has not testified. Cf. *Brock v. Carolina Scenic Stages*, 219 S. C. 360, 65 S. E. (2d) 468; *Shepherd v. United States Fidelity & Guaranty Co.*, 233 S. C. 536, 106 S. E. (2d) 381. It is true that the colored maid testified that the decedent was so close to the front of the bus that the driver could not have seen her but this was a mere conclusion which a jury would be at liberty to disregard. Moreover, her testimony is contradicted by that of another witness who said decedent was about a foot in front of the bus. If

the bus was so constructed as to obscure the vision of the driver, it could be reasonably inferred that he should have taken other precautions to see that the way was clear.

Of some analogy is *Gulf Transport Co. v. Allen*, 209 Miss. 206, 46 So. (2d) 436, 437. In that case, on a rainy day, a bus in which a woman 72 years of age was riding stopped off the pavement across the road from a store. She alighted and while trying to cross to the other side of the road, was run over by the bus and killed. When struck she was at a point about half the width of the bus. One witness said she walked "right in front of the bus." Another stated that she was about four feet in front of the bus as she passed around it. The driver testified that he never did see her after she alighted, although he kept a reasonable lookout. According to the plaintiff's testimony, the bus remained stopped about a minute. The estimate of defendant's witnesses varied from one and a half to five minutes. In holding that there was no error in refusing to direct a verdict for the defendant, the Court said that the jury was warranted in finding that decedent "after alighting from the bus, was never out of the range of the driver, before he struck her; (2) that slight attention on his part would have disclosed her presence and danger; (3) that the threatening weather would cause passengers to cross over to the store as quickly as possible, either in the front or the rear of the bus; and (4) that it was negligence to start the bus quickly before making a proper lookout to ascertain where the passengers were."

Arlington & Fairfax Motor Transportation Co. v. Simmonds, 182 Va. 796, 30 S. E. (2d) 581, 585, is distinguishable. There the bus had already started moving before the decedent tried to pass in front of it. The Court said that "it is negligence as a matter of law to heedlessly or inadvertently step directly in front of a moving bus."

The danger of moving a motor vehicle where someone in its path cannot be seen is illustrated in *Butler v. Temples*, 227 S. C. 496, 88 S. E. (2d) 586. There the defendant in

backing his car in a yard ran over a two year old child whom he knew had been playing in the yard shortly before but did not see behind his car. Also, see *Green v. Bolen, supra*, S. C., 115 S. E. (2d) 667.

There remains for consideration respondents' contention that the bus driver had the right-of-way under Section 46-435 of the 1952 Code, which provides in part: "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." As pointed out in *Nygren v. Minneapolis St. Ry. Co., supra*, 241 Minn. 485, 63 N. W. (2d) 560, this statute is not applicable since the bus was standing still when decedent started to cross in front of it.

The order of nonsuit is reversed and the case remanded for a new trial.

STUKES, C. J., and LEGGE, J., concur.

TAYLOR and MOSS, JJ., concur in result.

17718

Furman T. WALLACE, Respondent, v. A. H. GUION & COMPANY, Inc., Appellant
(117 S. E. (2d) 359)

Action for damage caused by use of explosives. The Common Pleas Court, Spartanburg County, J. Woodrow Lewis, J., overruled defendant's demurrer to complaint, and defendant appealed. The Supreme Court, Stukes, C. J., held that sewer ditch excavator would be liable for concussion and vibration damage resulting from its use of explosives even if it had not been negligent, and that complaint was not demurrable for failure to allege negligence.

Affirmed.

EXPLOSIVES.—Sewer ditch excavator would be liable for concussion and vibration damage resulting from its use of explosives even if it had not been negligent; and in action for such damage, complaint was not demurrable for failure to allege negligence.

Messrs. Butler & Chapman, of Spartanburg, for Appellant, cite: As to necessity for allegations of negligence in suit by property owner for damages to real property allegedly caused by concussion or vibration from dynamite or other explosives used by construction contractor: 32 S. C. 593, 10 S. E. 1076; 220 S. C. 124, 66 S. E. (2d) 465; 20 A. L. R. (2d) 1372; (Me.) 75 A. (2d) 802, 20 A. L. R. (2d) 1360; 140 N. Y. 267, 35 N. E. 592; 184 N. Y. 245, 77 N. E. 9; 204 N. Y. 660, 97 N. E. 1106; 53 S. C. 503, 31 S. E. 554; 81 S. C. 488, 62 S. E. 867.

Messrs. Wm. Alton Crow and J. Wright Nash, of Spartanburg, for Respondent, cite: As to it being unnecessary to allege negligence in suit by property owner for damages to real property caused by concussion or vibration from dynamite or other explosives used by construction contractor: 54 Fed. (2d) 510, 80 A. L. R. 686; 125 Neb. 277, 249 N. W. 599; 69 Cal. 155, 10 P. 395; 90 Ohio St. 144, 106 N. E. 970, L. R. A. 1915E, 356; 30 R. I. 346, 75 Atl. 404, 27 L. R. A. (N. S.) 425; 35 C. J. S. 238; 94 Ga. App. 791, 96 S. E. (2d) 213.

December 5, 1960.

STUKES, Chief Justice.

The question to be decided in this appeal is, as agreed upon by the litigants: Is it necessary for the plaintiff to allege negligence, operating as a proximate cause of his damage, in an action brought against a contractor, who was laying a sewer line on adjoining property, for damage to improvements on the plaintiff's real estate allegedly caused by concussion and vibration from dynamite or other explosives used by said contractor?

It is alleged in the complaint that defendant was engaged in excavating a large ditch in the City of Spartanburg in

which to lay a sewer on property at the rear of plaintiff's lot and within 200 feet of his residence; there were exploded great amounts of dynamite or other high explosives which resulted in violent earth vibrations and shock or concussion waves which caused plaintiff's home to vibrate to the extent that the plaster in the rooms cracked and crumbled, an exterior brick wall and foundation were cracked and the tile floors in portions of the home were torn loose from their fastenings, whereby the home was damaged.

The defendant demurred to the complaint upon the ground that it did not allege a cause of action because there are no allegations (1) of negligence, or (2) that rocks and other debris were thrown on plaintiff's property, or (3) that the explosives were greater than necessary to accomplish the purpose.

The demurrer was overruled and defendant has appealed. Appellant and respondent agree that the question presented is novel in this jurisdiction although there are tangent decisions of the court to which reference will be later made.

An annotation in 20 A. L. R. (2d) 1372, entitled, "Liability for property damage by concussion from blasting", shows the division of authority upon the question of whether a plaintiff must allege and prove negligence in order to recover in such cases. The apparent majority of the courts hold that it is not necessary to allege and prove negligence on the part of the defendant, and that conclusion may be said to be the trend of the modern decisions.

The following analysis of the cases by the annotator in 20 A. L. R. (2d) 1374, 1375, appears to be accurate and incisive:

"The conflict in the decisions is perfectly understandable in view of the fact that the courts are faced with two conflicting principles. First, there is the principle that one may not so use his own property as to injure the property of another (*sic utere tuo ut alienum non laedas*). Secondly, there is the principle which recognizes the right of the owner

of property to the fullest use of his property. If the first principle is considered paramount, then there would be liability, irrespective of negligence, but if the second principle is considered paramount, then there would be liability based upon negligence.

"The reasoning in those jurisdictions adopting the former view (absolute liability) is apparently to the effect that even though the defendant exercised the utmost care, it was he, nevertheless, who set in motion the agency which caused the damage and that he, and not the plaintiff, who did nothing, should be liable therefor.

"In some of the cases adopting the latter view (liability based on negligence), a distinction has been made based on the form of the action. If rocks and debris were thrown upon the plaintiff's land, a trespass results for which there is liability, irrespective of negligence, but if the damage was by concussion, there is no trespass, and the liability for such consequential damages must be based on negligence in an action on the case. This distinction, based on the historical difference between actions of trespass and case, has been severely criticized by many cases adopting the view of absolute liability in concussion cases. Likewise criticized by some cases has been the reasoning that there was no physical invasion when the damage was by concussion."

Now considered the leading case requiring for recovery allegation and proof of negligence is *Booth v. Rome, W. & O. Terminal R. Co.*, 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552, which is followed by many other New York decisions. It is interesting, however, that the rule of the *Booth case* is avoided in that jurisdiction if the action is brought upon the theory of a nuisance and the nuisance is proved, and liability exists irrespective of negligence. See the New York cases collected in 20 A. L. R. (2d) at page 1407. There are other instances where the New York courts have avoided the rule of the *Booth case*, which are noted in 2 Harper and James, Torts, 819, sec. 14.8. "Strict liability for blasting by indirection."

A leading case on explosives is *Exner v. Sherman Power Const. Co.*, 2 Cir., 54 F. (2d) 510, 512, 80 A. L. R. 686, opinion by Circuit Judge Augustus Hand. It involved the storage of dynamite but the majority rule of the blasting cases was applied and liability without negligence of the defendant was imposed. In the course of the opinion, which contains a wealth of citations, it was said by Judge Hand:

"Dynamite is of the class of elements which one who stores or uses in such a locality, or under such circumstances as to cause likelihood of risk to others, stores or uses at his peril. He is an insurer, and is absolutely liable if damage results to third persons, either from the direct impact of rocks thrown out by the explosion (which would be a common-law trespass) or from concussion. * * * The liability of the defendant is not founded on illegal storage or on negligence, which was not proved, but upon the ground that the use of dynamite is so dangerous that it ought to be at the owner's risk."

And further:

"We can see no reason for imposing a different liability for the results of an explosion, whether the dynamite explodes when stored or when employed in blasting. To be sure there is a greater likelihood of damage from blasting than from storage, but in each case the explosion arises from an act connected with a business conducted for profit and fraught with substantial risk and possibility of the gravest consequences. As Justice Holmes has said in *The Common Law*, p. 154: 'The possibility of a great danger has the same effects as the probability of a less one, and the law throws the risk of the venture on the person who introduces the peril into the community.'"

A well-reasoned decision, and also of first impression in that jurisdiction, is *Brooks v. Ready-Mix Concrete Co.*, 94 Ga. App. 791, 96 S. E. (2d) 213. The facts were very similar to those alleged in the case in hand and liability without allegation of negligence of the defendant was upheld. A

provision of the Georgia Code was referred to as of influence in the decision, but it appears to be only a codification of the common law. The decision was largely rested upon the authority of the *Exner case*, *supra*. The later Georgia decision of *Ready-Mix Concrete Co. v. Rape*, 98 Ga. App. 503, 106 S. E. (2d) 429, cited and followed the *Brooks case*.

The general rule of the blasting cases is stated in 35 C. J. S. (1960 Ed.) Explosives § 8a, pp. 275-277, as follows: "Under what has been called the rule of absolute or strict liability, one lawfully engaged in blasting operations is, according to the weight of authority, liable without regard to the question of whether or not he has been negligent, whereby his acts in casting rocks or other debris on adjoining or neighboring premises or highways he causes direct damage to property or causes direct injury to persons thereon. He is also, under the rule more generally adopted, liable for consequential injuries occasioned by concussion or vibration to property or for consequential injuries occasioned by concussion or vibration to persons, without the actual casting of material; nor is the rule restricted in application to instances where the blasting is a nuisance per se or where the property is contiguous or adjoining."

2 Harper and James, Torts, 812 et seq., sec. 14.6, contains excellent review of the authorities. The authors advocate the general rule which we follow. We quote briefly from their conclusion: "Blasting operations are dangerous and must pay their own way. * * * The principle of strict or absolute liability for extrahazardous activity thus is the only sound rationalization."

This majority rule of liability without allegation and proof of negligence has been adopted by the American Law Institute, Restatement of Torts, Vol. III, sec. 519, in which it is said in sec. 520, at page 44, "Blasting is ultrahazardous because high explosives are used and it is impossible to predict with certainty the extent or severity of its consequences." We think that is the better reasoned rule and,

supported as it is by the majority of the courts, we follow it. This requires affirmance of the order under appeal.

The earlier cases from this court that touch the problem, which are referred to hereinabove, are *Harris v. Simon*, 32 S. C. 593, 10 S. E. 1076, and *Momeier v. Koebig*, 220 S. C. 124, 66 S. E. 2d 465, 467. The first cited was an action for alleged wrongful death caused by a rock thrown by a blast from a quarry. Negligence was alleged and undertaken to be proved. The appeal was concerned solely with the sufficiency of the evidence of negligence. Thus the case is not apposite here where negligence is not alleged. The *Momeier case* was for damages for the allegedly negligent driving of piles on land adjoining plaintiff's lot. Judgment for the latter was reversed for lack of evidence of negligence. The "blasting cases" were mentioned but were differentiated by the court as not analogous, quoting from the opinion, "because the use of explosives is inherently dangerous to nearby property and pile driving is not." It was said in the opinion that *Harris v. Simon*, *supra*, apparently holds that in blasting cases proof of negligence is required to support a verdict for damages. The latter is not accurate as is seen by the foregoing comment on the *Harris case* and it will be disregarded as dictum. *Wood v. Pacolet Mfg. Co.*, 80 S. C. 47, 61 S. E. 95, was cited by the lower court in this case to the point that recovery of damages for trespass does not depend upon the negligence of the defendant. That was an action for trespass for the blasting of rock by the defendant from the plaintiff's land and arose out of a boundary dispute. It is seen that these cases are presently of no authority.

The order overruling the demurrer to the complaint is affirmed, and the appellant has leave to serve its answer within ten days after remittitur is filed in the lower court.

Affirmed.

TAYLOR, OXNER, LEGGE and MOSS, JJ., concur.

17719

Jesse T. REESE, Jr., Appellant, v. C. Laney TALBERT, County Supervisor; and Robert W. Eleazer, William C. Mahaffey, Jr., R. M. McGregor, J. L. Moore, T. D. Palmer, J. S. Sites and K. B. Taylor, together constituting the County Board of Commissioners of Richland County, Respondents
(117 S. E. (2d) 375)

Action for judgment declaring that the act authorizing issuance of general obligation bonds of Richland County in amount not exceeding \$350,000.00, the proceeds thereof to be used for improvement and renovation of existing public hospital facilities in the county is unconstitutional because it makes no provision for an election. From an adverse decree of the Common Pleas Court, Richland County, John Grimball, J., the plaintiff appealed. The Supreme Court, Legge, J., held that the Act is unconstitutional for failure to provide for such election as required by the constitutional amendment.

Reversed.

1. **CONSTITUTIONAL LAW.**—When language of constitutional amendment is of doubtful import, object of judicial inquiry as to its meaning is to ascertain the intent of its framers and of the people who adopted it, and in attempting to attain that object, courts may consider the history of the times in which amendment was framed, the object sought to be accomplished, and legislative interpretation of its provisions.
2. **COUNTIES.**—Under constitutional amendment providing that limitations imposed should not apply to bonded indebtedness incurred by Richland County when proceeds of bonds issued by it were applied exclusively to purpose of erection, improvement and maintenance of a public hospital and courthouse and when question of incurring "such indebtedness" is submitted to qualified electors, quoted words indicate that an election is required as a condition precedent to issuance of bonds for such purposes, and the amendment contains on its face no provision limiting that requirement to a situation in which by issuance of such bonds a county's bonded debt will exceed the amount limited by the constitution. Const. art. 8, § 7; art. 10, §§ 5, 6.

See publication Words and Phrases, for other judicial constructions and definitions of "Such Indebtedness".

3. COUNTIES.—The act purporting to authorize issuance of general obligation bonds of Richland County, the proceeds thereof to be used for improvement and renovation of existing public hospital facilities in the county, is unconstitutional for failure to provide for vote of qualified electors of Richland County on the question of issuance of such bonds as required by constitutional amendment. Act April 1, 1960, 51 Stat. at Large, p. 2799; Const. art. 8, § 7; art. 10, §§ 5, 6.

John G. Martin, Esq., of Columbia, for *Appellant*, cites: *As to the proposed bond issue, pursuant to Act 1112 of the General Assembly for 1960, exceeding the basic debt limitation and is therefore unconstitutional*: 128 S. C. 500, 122 S. E. 516; 127 S. C. 468, 121 S. E. 257; 116 S. C. 324, 108 S. E. 84; 151 S. C. 137, 148 S. E. 719; 179 S. C. 88, 183 S. E. 593; 234 S. C. 559, 109 S. E. (2d) 585.

Messrs. Frank A. Graham, Jr., of Columbia, and *Huger Sinkler*, of Charleston, for *Respondents*, cite: *As to the Act in question being constitutional*: (S. C.) 113 S. E. (2d) 417; 234 S. C. 559, 109 S. E. (2d) 585; 234 S. C. 563, 109 S. E. (2d) 579.

December 6, 1960.

LEGGE, Justice.

The Act of April 1, 1960 (51 Stat. at Large, p. 2799) purports to authorize the issuance of general obligation bonds of Richland County in an amount not exceeding \$350,000.00, the proceeds thereof to be used for the improvement and renovation of existing public hospital facilities in that county. Plaintiff seeks in this action a judgment declaring that Act unconstitutional because it makes no provision for an election, which he contends is required by a special amendment of the Constitution, ratified February 25, 1921, relating to the bonded indebtedness of Richland County. That amendment reads:

“That the limitations imposed in Section 7, of Article VIII, and in Sections 5 and 6 of Article X of the Constitution of the State of South Carolina, shall not apply to the bonded indebtedness incurred by the County of Richland,

when the proceeds of any bonds issued by said County are applied exclusively to the purpose of erection, improvement and maintenance of a public hospital and court house or in payment of debts incurred, and when the question of incurring such indebtedness is submitted to the qualified electors of said county, as provided by law."

The circuit decree, pointing out that at the time of the amendment in question the fifteen per cent over all debt limitation prescribed by Article X, Section 5, was being strictly observed under the literal interpretation that had been given it by this court in *Todd v. City of Laurens*, 1897, 48 S. C. 395, 26 S. E. 682, concludes that the legislative purpose of the amendment was merely to enable Richland County to issue bonds for courthouse or hospital purposes if and when that limitation would be thereby exceeded, provided the question of their issuance were voted upon in the affirmative by the qualified electors of the county.

When the language of a constitutional amendment is of doubtful import, the object of judicial inquiry as to its meaning is to ascertain the intent of its framers and of the people who adopted it. *Heinitsh v. Floyd*, 130 S. C. 434, 126 S. E. 336; *Duncan v. Record Publishing Co.*, 145 S. C. 196, 143 S. E. 31; *Ansel v. Means*, 171 S. C. 432, 172 S. E. 434. And in attempting to attain that object, the courts may consider the history of the times in which the amendment was framed, the object sought to be accomplished, and legislative interpretation of its provisions. *Kirkland v. Allendale County*, 128 S. C. 541, 123 S. E. 648; *Covington v. McInnis*, 144 S. C. 391, 142 S. E. 650; *Powers v. State Educational Finance Commission*, 222 S. C. 433, 73 S. E. (2d) 456; *Johnson v. Thomason*, 236 S. C. 135, 113 S. E. (2d) 417.

The reason assigned by the circuit court for its conclusion before stated would be more persuasive if when the amendment in question was proposed the amount of Richland County's bonded debt had been such that the issuance of

bonds for hospital and courthouse purposes would likely have resulted in an excess of bonded indebtedness over the eight per cent limitation or the fifteen per cent over-all limitation prescribed by Article X, Section 5. But the record here discloses no factual basis for the assumption that such would have been the case. It is true that the defendants in their answer alleged, upon information and belief, "that on the occasion that the Constitutional amendment was adopted, the debt of Richland County, and certain of the political subdivisions and municipal corporations covering and extending over portions of the territory of Richland County, was such that the original limitations of Section 5 of Article X would be violated by further incurring of bonded debt, and for this reason it was necessary to provide means for the issuance of bonds." But no proof in support of that allegation appears in the record. Actually, the circuit decree made no direct factual finding as to the quoted allegation; it went no farther than to say that the City of Columbia, "at that time had a substantial debt", and that "school districts and townships likewise had bonded debt"; and the record discloses no evidentiary basis for even that finding.

The amendment under consideration provides that

2 the limitations imposed in Section 7 of Article VIII and in Sections 5 and 6 of Article X shall not apply to bonded indebtedness incurred by Richland County when the proceeds of bonds issued by it are applied exclusively to the purpose of erection, improvement and maintenance of a public hospital and courthouse "* * * and when the question of incurring *such indebtedness* is submitted to the qualified electors of said municipality, as provided by law." (Italics ours.) The italicized words plainly indicate that an election is required as a condition precedent to the issuance of bonds for such purposes, and the amendment contains on its face no provision limiting that requirement to a situation in which by the issuance of such bonds the county's bonded debt will exceed the amount limited by the Constitution. Respondents, so conceding, argue: that the amendment con-

tains no language expressly or by reasonable implication curtailing the legislative power, existing prior to its adoption, to authorize the county to issue, without an election, bonds up to the constitutional debt limit; that all amendments to Sections 5 and 6 of Article X have been for the purpose of enlarging, not reducing, the original debt limits, *Knight v. Allen*, 234 S. C. 559, 109 S. E. (2d) 585; and that therefore the circuit decree correctly held that since the bonds authorized by the Act of April 1, 1960 will be within the constitutional debt limit of Richland County, no election was necessary. The following considerations suggest a contrary conclusion:

1. As we have already indicated, to sustain respondents' position would require writing into the amendment a provision not suggested by its language or by any pertinent circumstances shown by the record to have surrounded its proposal and adoption.

2. Section 5 of Article X contains three distinct limitations upon the power of the General Assembly to permit a county to issue general obligation bonds, *viz.*:

- (a) That its bonded indebtedness shall not exceed eight percent of the assessed value of all taxable property within the county;

- (b) That the aggregate debt upon any territory overlapped by several political divisions or municipal corporations shall not exceed fifteen percent of the assessed value of all taxable property within such territory; and

- (c) That a county may be vested with power to assess and collect taxes (a power essential to the issuance of general obligation bonds) only for "corporate purposes."

Further limitation is found in the provision of Section 6 of Article X that "the General Assembly shall not have power to authorize any county * * * to levy a tax or issue bonds for any purpose except for educational purposes, to build and repair public roads, buildings and bridges, to maintain and support prisoners, pay jurors, County officers,

and for litigation, quarantine and court expenses and for ordinary County purposes, to support paupers, and pay past indebtedness."

The legislative thinking in regard to the amendment in question may well have been influenced by the last mentioned limitation of Section 5 and the quoted limitation of Section 6, of Article X, because of doubt at the time of its proposal, 1920, and its ratification, 1921, that the erection, improvement and maintenance of a public hospital were "corporate purposes" or "ordinary County purposes" within the meaning of those limitations. That such doubt existed as late as 1924 is evident from *Battle v. Willcox*, 128 S. C. 500, 122 S. E. 516, decided in that year. Why the amendment referred also to the erection, improvement and maintenance of a courthouse must be left to conjecture. The establishment of a courthouse would appear to be a proper county purpose under Sections 5 and 6 of Article X as originally written; and since Richland County had had its courthouse for many years prior to 1920, it can only be surmised that the erection of a new one was at that time considered an item of expense so extraordinary as to require its approval by the voters of the county.

(Since Section 7 of Article VIII relates solely to bonded indebtedness of cities and towns, we confess our inability to understand why the Amendment with which we are here concerned made reference to it.)

3. Section 6 of Article X, which in detail limits the purposes for which the General Assembly may authorize a county or township to issue general obligation bonds, appears to have been amended but five times, as follows:

(a) 1911. To authorize townships in Greenwood and Saluda Counties through which a proposed railroad was to be constructed to vote bonds in aid of the construction of said railroad.

(b) 1921. The amendment here involved, authorizing Richland County to issue bonds for the erection, improvement and maintenance of a public hospital and courthouse.

(c) 1923. To authorize Christ Church Parish Township in Charleston County to vote bonds for the construction and maintenance of a railroad through that township and through the town of Mount Pleasant.

(d) 1927. To authorize St. James Santee Township in Charleston County to vote bonds for the construction and maintenance of a railroad through that township.

(e) 1945. To authorize counties and townships to issue bonds for the construction and maintenance of airports or landing strips.

Since all of the other amendments of Section 6 dealt with the issuance of bonds for purposes other than those limited by the section as originally adopted, it would seem reasonable to infer that those contemplated by the Richland amendment, at least so far as they related to bonds for the construction, improvement and maintenance of hospitals, were also considered as beyond the scope of the original section, and that that amendment was concerned with enlargement of the purposes for which Richland County might be authorized to issue bonds, as well as with the amount of the contemplated issue.

4. On February 25, 1921, the same day on which the amendment in question was ratified, the General Assembly passed an Act (32 Stat. at Large, p. 25) authorizing Richland County to issue bonds not to exceed \$300,000.00 for the purpose of taking over, operating and maintaining the Columbia Hospital, \$100,000.00 of the proceeds of said bonds to be used for acquisition, and the balance for improvement and maintenance. The act required, as a condition precedent to the issuance of said bonds, that the question of their issuance be voted upon by the qualified electors of the county at an election to be held for that purpose.

(On February 28, 1921, an Act was passed, 32 Stat. at Large, p. 728, authorizing the issuance of \$500,000.00 of bonds of Richland County, the proceeds to be used to build a new courthouse. This act likewise required an election on the question of the issuance of said bonds.)

On June 3, 1940, an Act was passed, 41 Stat. at Large, p. 2726, authorizing the issuance of \$425,000.00 of bonds of Richland County, the proceeds to be used to improve, enlarge, extend and equip the Richland County Hospital. Again an election was required.

By the Act of May 11, 1955, 49 Stat. at Large, p. 1313, Richland County was authorized to issue up to \$1,405,000.00 of bonds for capital improvements to its existing hospital facilities. Again an election was required.

By the Act of May 9, 1957, 50 Stat. at Large, p. 1293, Richland County was authorized to issue not exceeding \$1,-600,000.00 of bonds for capital improvements to its existing hospital facilities. Again an election was required. As in the 1955 Act, the purpose of the issue, as required to be stated on the ballot, was "payment of the cost of constructing and equipping hospital facilities in Richland County."

It is, of course, possible that in proposing and ratifying the 1921 Amendment the General Assembly may have intended, as respondents argue, that the question of issuing bonds for hospital purposes should be submitted to the voters of Richland County only when the issuance of such bonds would raise that county's bonded debt beyond the amount limited by the Constitution. But no such legislative intent is suggested by the language of the Amendment or by that of the legislation just mentioned; and, as before pointed out, there is in the record before us no factual showing of such intent. We are not at liberty to assume it; to do so would lead us, under the guise of interpretation, to amend the Amendment by adding a proviso so as to make it conform to respondents' view.

In our opinion the 1921 Amendment requires the
3 vote of the qualified electors of Richland County on the question of the issuance of bonds such as are proposed to be issued under the Act of April 1, 1960, and that Act is invalid in that it makes no provision for such election.

Reversed.

STUKES, C. J., and TAYLOR, OXNER and MOSS, JJ.,
concur.

17720

Charlie KELLY, Appellant, v. W. M. MANNING, Superintendent of
The South Carolina Penitentiary, Respondent
(117 S. E. (2d) 362)

Habeas corpus proceeding. From orders of the General Sessions Court, Richland County, James Hugh McFaddin, J., denying petition that petitioner be furnished without cost of copies of all proceedings in trial and at coroner's inquest, and denying petition for writ of habeas corpus, the petitioner appealed. The Supreme Court, Legge, J., held that where petitioner's testimony suggested no reason for issuance of writ other than that he was drunk, and voluntarily so, when he pleaded guilty to charge of murder, and in making such plea he was represented by able and experienced counsel, no appeal had been taken from his sentence, no motion for new trial was made and more than ten years elapsed before petitions for writ of habeas corpus and to furnish him copies of proceedings at trial and at coroner's inquest were filed in his behalf, if in fact he was drunk when he entered his plea, he showed no excuse for his failure to make that contention earlier and hence the petitions were properly denied.

Affirmed.

1. **HABEAS CORPUS.**—Where petitioner's testimony in habeas corpus proceeding suggested no reason for issuance of writ other than that he was drunk, and voluntarily so, when he pleaded guilty to charge of murder, and in making such plea he was represented by able and experienced counsel, no appeal had been taken from his sentence, no motion for new trial was made and more than ten years elapsed before petitions for writ of habeas corpus and to furnish him copies of proceedings at trial and at coroner's inquest were filed in his behalf, if in fact he was drunk when he entered his plea, he showed no excuse for his failure to make that contention earlier and hence the petitions were properly denied.

2. **HABEAS CORPUS.**—On appeal from order denying petition for habeas corpus, petitioner's argument, which he had not presented to trial court, that his counsel at time of his plea of guilty had been employed by sheriff and that the sheriff and counsel deliberately placed intoxicating liquor within petitioner's reach so that he would become drunk and plead guilty to a crime of which he was innocent would be rejected because (a) it was not presented before trial judge, (b) it was wholly lacking in evidentiary support and (c) it came too late when made more than ten years after the plea and sentence, and long after the sheriff and petitioner's counsel died.

Charlie Kelly, Appellant, of Columbia, in Pro. Per., cites: As to involuntary intoxication affording a valid defense to a criminal charge: 297 P. 1029, 38 Ariz. 99; 115 S. E. 673, 135 Va. 524, 30 A. L. R. 755. As to conviction not standing if the accused is denied the effective assistance of counsel, or any other element of due process of law: 191 F. (2d) 749; 86 Cal. App. (2d) 289, 194 P. (2d) 829; 210 Ga. 262, 79 S. E. (2d) 1; 90 F. (2d) 242; 315 U. S. 60, 76, 62 S. Ct. 457, 86 L. Ed. 680; 152 F. (2d) 14; 137 Fed. Supp. 533. As to one accused of murder being entitled to a fair trial as guaranteed by the Constitution: 187 Va. 774, 48 S. E. (2d) 213.

Messrs. Daniel R. McLeod, Attorney General, and J. C. Coleman, Jr., Assistant Attorney General, of Columbia, for Respondent, cite: As to defendant's constitutional rights not being violated: 2 L. Ed. (2d) 1523, 357 U. S. 504, 78 S. Ct. 1297; 1 L. Ed. (2d) 1479, 354 U. S. 449, 77 S. Ct. 1356. As to the denial of due process being tested by an appraisal of the totality of facts in a given case: 224 F. (2d) 901. As to appellant, under conditions prevailing in instant case, not being entitled to free copy of transcript: 142 F. Supp. 638.

December 6, 1960.

LEGGE, Justice.

Appellant, an inmate of the State Penitentiary, is serving two life sentences: one imposed in Charleston County on June 14, 1945, following his plea of guilty to a charge of

kidnapping; the other imposed in Richland County on September 19, 1949, as the result, according to his statement, of an agreement between his counsel and the State whereby, upon his plea of guilty to a charge of murder, the jury recommended mercy under the court's instruction. Appearing in his own behalf, he now appeals from two orders of the Honorable James Hugh McFaddin, Presiding Judge of the Fifth Judicial Circuit, both relating to the trial in Richland County, to wit:

1. An order dated November 24, 1959, denying his petition that he be furnished without cost copies of all proceedings in that trial and at the coroner's inquest concerning the death out of which that trial arose; and

2. An order dated December 31, 1959, denying his petition for a writ of habeas corpus.

At the hearing of his petitions before Judge McFaddin, appellant, who was represented by counsel, testified in substance as follows:

In 1943 he and Fred Poole and T. R. Tindall went to a place of business in Richland County to commit robbery, and in the course of the commission or attempted commission of that crime Poole shot and killed one John W. Kelly. Appellant was not actually present when the shooting occurred; he was two blocks away. Poole escaped; was later picked up in Georgia; escaped from jail there; and was finally apprehended in Louisiana in 1949. Appellant was arrested a week or two after the crime, and was released on bond. In 1945 he was indicted in Charleston County for kidnapping, to which he pleaded guilty; and he was thereupon sentenced to imprisonment for life. In 1949, he was taken from the penitentiary to stand trial in Richland County, along with Poole and Tindall, for the murder of John W. Kelly. (It appears from the record here that the indictment, which Judge McFaddin had before him upon the hearing of the petitions, did not charge that appellant had shot John W. Kelly, but charged that he and Tindall

had been "actually and constructively present" and had aided and abetted in the murder committed by Poole.)

We quote appellant's testimony as to what occurred when he was brought to trial in Richland County:

"Well, I was at the penitentiary at the time, and Judge Holman was my lawyer. So we came to court, and the sheriff took me down and put me down in a room downstairs, and I was left in there for an hour or an hour and a half, and I ran up on some liquor down there, and I took that liquor and drank it. When I came in court I was pretty well drunk, so I don't know exactly what they done; and the lawyer said, 'Just go ahead and plead guilty; it doesn't mean nothing. You already have one, and it runs concurrently.' So, I guess, I pled guilty. I don't know. When I got back to the penitentiary I was just about drunk.

"The Court: You drank the liquor voluntarily?

"The Petitioner: I found it down in the room, and naturally I was going to drink it.

"The Court: The question was did you drink it voluntarily. Nobody forced you to drink it?

"The Petitioner: No, sir; nobody forced me to drink it."

We find no error in Judge McFaddin's denial of
1 appellant's petitions. By his own testimony it is apparent that the record in the Court of General Sessions for Richland County pertaining to his indictment, plea of guilty, and sentence could furnish no basis for the issuance of the writ of habeas corpus. And he has made no showing from which it might reasonably be inferred that a copy of the proceedings at the coroner's inquest would aid him in seeking the writ.

Appellant's testimony just quoted suggests no reason for the issuance of the writ other than that he was drunk, and voluntarily so, when he pleaded guilty. In making that plea he was represented by the late A. W. Holman, Esq., an able, experienced and respected member of the Richland County Bar. No appeal was taken from his sentence; no motion for

new trial was made; and more than ten years elapsed before the petitions now under review were filed in his behalf. If in fact he was drunk when he entered his plea, he has shown no excuse for his failure to make that contention before now. *Williams v. Inabinet*, 1 Bailey 343, 17 S. C. L. 343; *State v. Mayfield*, 235 S. C. 11, 109 S. E. (2d) 716; *Hamilton v. Palmetto Properties, Inc.*, S. C., 116 S. E. (2d) 12.

Appellant also testified that when he was arrested, in 2 1943, he and Tindall were "grilled" by the police officers, without opportunity to confer with counsel, from four o'clock one afternoon until daybreak of the next morning, when Tindall finally "copped out"; and that he (appellant) agreed, under such compulsion, to confess to the crime of conspiracy to commit robbery. Six years later, when he pleaded guilty, he made no such contention. He now argues, although he did not so allege in his petition and did not so testify, that his counsel at the time of his plea had been employed not by him but by Sheriff T. A. Heise of Richland County, and that together they deliberately placed intoxicating liquor within his reach so that he would become drunk and plead guilty to a crime of which he was innocent. Such argument we reject because: (a) it was not presented before Judge McFaddin; (b) it is wholly lacking in evidentiary support; and (c) it comes too late when made more than ten years after the plea and sentence, and long after the death of Sheriff Heise and that of appellant's counsel.

Affirmed.

STUKES, C. J., and TAYLOR, OXNER, and MOSS, JJ.,
concur.

17722

STATE, Respondent, v. Gentry PUCKETT, John W. Burgess and Don Wheeler, Appellants
(117 S. E. (2d) 369)

Prosecution for attempted burglary, conspiracy to commit burglary, and possession of burglar's tools. The General Sessions Court, Sumter County, James Hugh McFaddin, J., rendered judgment, and defendants appealed. The Supreme Court, Moss, J., held that evidence sustained the convictions.

Exceptions overruled and judgment affirmed.

1. CRIMINAL LAW.—On appeal from a refusal to direct a verdict of not guilty, to enter a judgment *n. o. v.*, or to grant a motion for a new trial, evidence and inferences which may reasonably be drawn therefrom must be viewed in light most favorable to state.
2. BURGLARY—CONSPIRACY.—Evidence sustained convictions for attempted burglary, conspiracy to commit burglary, and the possession of burglar's tools. Code 1952, §§ 16-302, 16-361.
3. CRIMINAL LAW.—Where, although an exhibit was admitted over defendant's objection, defendant, without reserving objection, cross examined a witness concerning the exhibit, the objection was lost, and any error in admission was cured.
4. CRIMINAL LAW.—In burglary prosecution of several defendants, one of whom had been a policeman in a certain town, wherein there was evidence that a crowbar was found at scene of crime, evidence that such a crowbar had disappeared from the town fire department, and another crowbar from that fire department, allegedly identical with the one involved in crime, were relevant and admissible.

Messrs. J. Nat Hamrick, of Rutherfordton, N. C., and J. Shepherd Thompson, of Georgetown, for Appellants, cite: As to definition of the crime of conspiracy: 88 S. C. 229, 70 S. E. 811; 56 S. E. (2d) 330.

R. Kirk McLeod, Esq., of Sumter, for Respondent, cites: As to evidence being sufficient to prove conspiracy: 69 S. E. (2d) 363, 221 S. C. 91; 113 S. E. 691, 121 S. C. 275; 80 S. E. 482. As to there being sufficient evidence of attempted house-breaking on the part of the defendants, or either of

them, for this question to have been submitted to the jury: 70 S. E. (2d) 632, 221 S. C. 399; 65 S. E. 1023, 84 S. C. 45; 2 Brev. 338 (4 S. C. L.); 93 S. E. 125, 107 S. C. 443. *As to there being sufficient evidence to prove possession of the burglary tools:* 59 S. E. (2d) 155, 216 S. C. 552; 71 S. E. (2d) 306, 221 S. C. 472.

December 7, 1960.

Moss, Justice.

At a Court of General Sessions held in Sumter, South Carolina, in May 1959, Gentry Puckett, John W. Burgess and Don Wheeler, the appellants herein, along with Jimmy Lane and Floyd E. Trantham, were indicted for (1) conspiracy to break and enter the Piggly Wiggly Store owned by one Red Baker, with intent to steal therefrom, in violation of Section 16-550, as appears in the cumulative supplement to the 1952 Code; (2) attempting to enter the store house aforesaid with intent to steal and carry away the goods of the owner thereof, in violation of Section 16-361 of the 1952 Code of Laws of South Carolina; and (3) for the possession of certain named tools or other implements or things adapted or commonly used for the commission of burglary, larceny, safe cracking, or other crime, under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a crime, or knowing that the same were intended to be so used, in violation of Section 16-302 of the 1952 Code of Laws of South Carolina. At the close of the testimony of the State, a directed verdict was granted as to the appellant, Gentry Puckett, on Count 2 of the aforesaid indictment. All of the appellants, along with the defendant Jimmy Lane, interposed motions for a directed verdict of not guilty on all counts of the indictment at the close of the State's testimony, and again at the close of the testimony in behalf of the appellants and Jimmy Lane. All of these motions were refused, with the exception above stated. The case was submitted to the jury and a verdict of guilty was returned. A motion was then made on

behalf of the appellants for the direction of a verdict *non obstante veredicto*. This motion was refused and the appellants, along with Jimmy Lane, were duly sentenced. Timely notice of intention to appeal to this Court was given by the appellants hereinbefore named. The ten exceptions filed by the appellants raise only two questions. By the first nine exceptions, the appellants contend that the evidence is insufficient to support the verdict rendered by the jury, and that the trial Judge should have directed a verdict in their favor or granted judgment *non obstante veredicto*. The other question is whether the trial Judge committed error in the admission of certain evidence.

Section 16-550 of the 1959 cumulative supplement to the 1952 Code of Laws, defines a conspiracy as follows: "The crime known to the common law as conspiracy is hereby defined as a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object, or an object neither criminal nor unlawful by criminal or unlawful means." The foregoing statute defining conspiracy confirms a definition thereof as is contained in *State v. Amecker*, 73 S. C. 330, 53 S. E. 484; *State v. Davis*, 88 S. C. 229, 70 S. E. 811, 34 L. R. A., N. S., 295; and *State v. Hightower*, 221 S. C. 91, 69 S. E. (2d) 363, 369. In the last cited case, as to the proof of conspiracy, this Court said:

"The generally recognized rule is that the fact of a conspiracy may be proved by any relevant competent evidence, having a legitimate tendency to support the accusation. The conspiracy may be shown, of course, not only by direct evidence, but by circumstantial evidence, or by both. And in a case of this kind, in the reception of circumstantial evidence, great latitude must be allowed. *State v. Shipman*, 202 N. C. 518, 163 S. E. 657; 15 C. J. S., Conspiracy, § 92b, p. 1141. Here, we have not only circumstantial evidence, but direct evidence going to prove appellant's guilt.

"Conspiracies may and generally must be proved by a number of indefinite circumstances which vary according to

the objects to be accomplished. Any circumstance or act standing alone might have little weight, but, taken collectively, they point unerringly to the existence of the conspiracy. *Bloomer v. State*, 48 Md. 521. And as stated by the Court in *State v. Anderson*, 208 N. C. 771, 182 S. E. 643, 652: 'When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote their real purpose.' And see Annotation, Vol. 3 Am. St. Rep., Page 482."

The appellants John W. Burgess and Don Wheeler were convicted of a violation of Section 16-361 of the 1952 Code of Laws of South Carolina, which provides: "Any person who shall enter, without breaking, or attempt to enter any house * * * with intent to steal or commit any other crime * * * shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished in the discretion of the court."

The third count of the indictment charges the appellants with a violation of Section 16-302 of the 1952 Code of Laws, which provides that, "A person who * * * has in his possession in the day or nighttime any engine, machine, tool, false-key, pick-lock, bit, nippers, nitroglycerine, dynamite-cap, coil or fuse, steel wedge, drills, tap-pin or other implement or thing adapted, designed or commonly used for the commission of burglary, larceny, safe cracking or other crime, under circumstances evincing any intent to use or employ or allow the same to be used or employed in the commission of a crime or knowing that the same are intended to be so used shall, upon conviction, be guilty of a misdemeanor. In either case he shall, upon conviction, be punished at the discretion of the court." This statute was before this Court in the cases of *State v. Pulley*, 216 S. C. 552, 59 S. E. (2d) 155, and *State v. Nicholson*, 221 S. C. 472, 71 S. E. (2d) 306. In these cases this Court held that the fact that a particular tool may be, and frequently is, put to a lawful

use, is not conclusive that it may not have been, in a given case, intended to be used in the commission of crime, such as burglary, larceny and safe cracking. In *State v. Pulley, supra*, it was held that the possession of articles suitable for breaking and entering may constitute an offense under Section 16-302 of the Code, though they were not originally designed for a burglarious purpose. 12 C. J. S. Burglary § 69, page 753. The statute, Section 16-302, provides that if such tools are in the possession of one, under circumstances evincing an intent to use or employ or allow the same to be used or employed in the commission of a crime, then the possessor of such tools is guilty.

Where there is a motion for a directed verdict or
1 judgment *non obstante veredicto* on the ground of the insufficiency of the evidence to require the submission of the case to the jury, we are bound by the rule as stated in the case of *State v. Nicholson et al.*, 221 S. C. 399, 70 S. E. (2d) 632, 633, where we said:

“* * * on an appeal from the refusal of the Court to direct a verdict of not guilty, or grant a motion for a new trial in a criminal case, the evidence and the inferences which may reasonably be drawn therefrom, must be viewed in the light most favorable to the State. It is unnecessary to cite authority for this postulate.” See also *State v. Littlejohn*, 228 S. C. 324, 89 S. E. (2d) 924, and *State v. Epes*, 209 S. C. 246, 39 S. E. (2d) 769.

It is the contention of the appellants that the entire testimony of the State is based on circumstantial evidence and did not meet the test required by law since even if the jury believed each circumstance offered, the same did not point to the guilt of the appellants nor was such consistent with their guilt and inconsistent with their innocence. In *State v. Littlejohn, supra*, the rule as to circumstantial evidence is thus stated:

“* * * It must be remembered, too, that there is one test by which circumstantial evidence is to be measured by the

jury in its deliberations, and quite another by which it is to be measured by the trial judge in his consideration of the accused's motion for a directed verdict. As to the former, it is necessary that every circumstance relied upon by the state be proven beyond a reasonable doubt; and that all of the circumstances so proven be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one; and if, assuming them to be true, they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed. *State v. Kimbrell*, 191 S. C. 238, 4 S. E. (2d) 121. So the trial judge charged, in substance, in the instant case, concluding with the following: 'In other words, in the consideration of circumstantial evidence, the jury must seek some explanation thereof other than the guilt of the accused, and, if such reasonable explanation can be found, the jury cannot convict on such evidence.' Such test goes to the weight of the evidence, and is therefore to be applied by the jury in their consideration of it. *State v. Roddey*, 126 S. C. 499, 120 S. E. 359. But on a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. *State v. Brown*, 205 S. C. 514, 32 S. E. (2d) 825." [228 S. C. 324, 89 S. E. (2d) 926.]

It is contended that the trial Judge erred in refusing a motion by the appellants for a directed verdict made when the State rested its testimony and again at the conclusion of all the testimony. It is likewise contended that there was error in failing to direct a verdict of acquittal *non obstante veredicto*. Therefore, it becomes necessary to review the testimony to determine this issue.

It appears that Gentry Puckett was formerly a police officer at North Augusta, South Carolina, and his services as an officer had been terminated. John W. Burgess of Mooresboro, North Carolina, had been unemployed for more than two years. Don Wheeler was from Johnston City, Tennessee, and there is no testimony as to his occupation. Jimmy Lane was a service station employee in Forest City, North Carolina. Floyd E. Trantham was in the Air Force at Fort Bragg, Fayetteville, North Carolina. It appears from the record that the appellants and Jimmy Lane met in Henrietta, North Carolina, at the residence of the appellant, John W. Burgess. They traveled from there in the automobile of Gentry Puckett to Camden, South Carolina, where they were joined by Floyd E. Trantham. The record shows that Trantham left his car in Camden and the five rode together in Puckett's car. They traveled over highway 521 and turned on to highway 441 and drove into the yard in front of the Piggly Wiggly store owned by one Red Baker. It appears that all of the occupants of the Puckett car got out at the Piggly Wiggly store. The evidence shows that John W. Burgess, Don Wheeler and Jimmy Lane were left at the Piggly Wiggly store and Puckett and Trantham left in Puckett's car, ostensibly to set up a "poker game."

It appears by the testimony of H. F. Reeves, a highway patrolman, that he was patrolling highway 441 around 8 P. M. and that when he started to turn at the Piggly Wiggly store "my head lights hit a man that was running off. He ran in front of the market and around the side of it, and as I was passing by I saw another man standing there." This officer testified that he unsuccessfully tried to catch the man who was running away. He further testified that when he went back around the front of the store he found the appellant, Burgess, who told him that he was waiting for a North Augusta policeman, and that the policeman had gone to Trantham's place to "pick up two girls." This officer testified that in checking the premises he found a pair of gloves and a crow bar on a platform near the ice house ad-

jacent to the store. He also testified that he saw the appellant, Burgess, hiding a loaded 38 snub nosed pistol under the ice house. This officer testified that he examined the front door of the Piggly Wiggly store and found a fresh "skinned mark", indicating that the door of the store had been tampered with by some instrument. This officer also identified Jimmy Lee as being the other man that he saw running in front of the Piggly Wiggly store. The proprietor of the Piggly Wiggly store testified that when he closed the store at approximately 6 o'clock, the skinned place testified to by the highway patrolman, was not on the door. This same witness testified that when he later examined the door that it had been tampered with and that the outer edge had been shelled off, and there were scratches on the lock.

H. E. Barber testified that he was chief of the fire department of North Augusta, South Carolina, and that Gentry Puckett was a member of the police department a week prior to April 29, 1959, and that the police department and the fire department are located in the same building. This witness was shown the crow bar that had been found at the Piggly Wiggly store and he described it as "a halicon tool" and that such was used as "a forcible entry tool". He further testified that his department formerly owned three of such tools and that one was missing. There was offered in evidence such a tool as was brought by this witness and it was identical with the one found at the Piggly Wiggly store.

Floyd E. Trantham, a defendant in the case, but who was not on trial, testified in behalf of the State. He said that the weekend before the incident at the Piggly Wiggly store that his car had quit running and was being worked on with a bar and that Gentry Puckett made a remark that he got two good bars off of a fire truck at North Augusta. However, this witness denied that the bar that was used in working on his car was either of those in evidence. This witness testified that the purpose of the trip was to set up a poker game for the next day because it was pay day at the air base. He testified that the appellants, Burgess and Wheeler, along

with Lane, were left at the Piggly Wiggly store and that he left with the appellant, Puckett. He says that with Puckett he returned in about fifteen minutes and upon seeing a highway patrol car in front of the Piggly Wiggly store, they did not stop but went on down the road and picked up Lane and Wheeler. He also testified that they were supposed to pick up Lane, Wheeler and Burgess at the Piggly Wiggly store. He further testified that he, with Puckett, Lane and Wheeler went back to Camden and there Trantham turned his car, which he had parked previously in Camden, over to Wheeler and Lane. Trantham and Puckett returned to Shaw field. The two drove by the Piggly Wiggly store several times and finally pulled into a side road about two miles from the store. It was there that Lt. Dollard of the South Carolina Law Enforcement Division, along with Agent Fender, apprehended Puckett and Trantham. Dollard testified that he had seen this car pass the Piggly Wiggly store while an investigation was in progress. A search of the car owned by Puckett was made and there was found a 38 snub nosed pistol, a carbine rifle, with ammunition consisting of several clips and a belt with several clips, a sledge hammer, a large file, two feelers, described as tools used to trip tumblers of a safe, safe peeler, glass cutter, a punch, a flash light, and aluminum knucks. The testimony of the law enforcement officers was that the tools found in the car of Puckett were adapted to use in various activities connected with house breaking and safe cracking. In fact, the appellant Puckett admitted that certain of the tools found in his car could be so used. He also testified that he had no place at home to lock up these various tools and was carrying them around in his car. All of the appellants, and Lane and Trantham, specifically denied the formation of any conspiracy to break and enter the Piggly Wiggly store or of attempting to enter such with intent to steal the goods therefrom. They each denied any knowledge of the gloves, crow bar and pistol found at the Piggly Wiggly store. Puckett admitted the possession of the tools found in his car but denied that he had them

for the purpose of committing burglary, larceny, safe cracking or other crime. All others denied any knowledge of the possession of the tools by Puckett.

As is heretofore pointed out, a pair of gloves was found at the Piggly Wiggly store. After Trantham was released from jail and his Cadillac automobile was returned to him at the jail, he testified that he found a piece of paper in his car. It was identified as a tag from a pair of gloves and written on such tag was "A glove for every job." Trantham denied that he put this tag in his car and testified that it was not in his car when he last had possession thereof. We point out in this connection that Lane and Wheeler had been given possession of Trantham's car in Camden, after a pair of gloves had been found at the Piggly Wiggly store. Puckett testified that when he came back to the Piggly Wiggly store, in company with Trantham, and saw the car of the highway patrolman there, that he passed on by the store and down the road picked up Lane, and that Wheeler "whistled" and ran over to the car, and the four of them "took off to Camden."

We think it unnecessary to recite any further testimony in detail. The evidence in behalf of the appellants contradicts in many particulars that offered by the State. There is also a conflict in the evidence given by the appellants. The intent with which an act is done denotes a state of mind, and it can be proved only from expression or conduct, or both, given in the light of the circumstances. It was for the jury in this case to determine from the circumstances, acts and declarations of the appellants whether or not they had entered into a combination or a conspiracy to break and enter the Piggly Wiggly store referred to in the testimony, with the intent to steal therefrom. It was likewise a question for the jury to determine whether the appellants possessed certain tools or implements commonly used for the commission of burglary, larceny, safe cracking or other crime. The question of whether such tools were possessed with the intent to use or employ them in the commission of a crime was for de-

termination by the jury, which, by their verdict, they have found against the appellants. There was a reasonable conclusion to be drawn from the evidence that the appellants had an intent to use the tools and implements found in the car of the appellant, Puckett, in the commission of a crime. Many of the tools so found could be put to a lawful use but it is not reasonable to suppose that a person without criminal intent would be driving about with such an assorted and complete collection of tools and implements commonly used in burglary, larceny and safe cracking.

In view of the evidence, we think that the learned
2 trial Judge properly refused to direct a verdict of not guilty or an acquittal *non obstante veredicto*.

When H. F. Reeves, the highway patrolman, was on the stand he identified a crow bar, otherwise described as a halicon tool, that he found lying on the platform at the ice house near the Piggly Wiggly store. This instrument was offered in evidence as an exhibit by the State and no objection to such admission was made by the appellants. Thereafter, H. E. Barber, chief of the fire department of North Augusta, South Carolina, was sworn as a witness for the State and there was exhibited to him the crow bar or halicon tool that was already in evidence. He testified that his fire department used such an instrument as a forcible entry tool. He further testified that his fire department was previously equipped with three such instruments but that they now have only two, one having disappeared. He testified that he did not know what became of the crow bar or halicon tool that was missing. He also testified that Gentry Puckett worked as a policeman in North Augusta and his police department was in the same building with the fire department.

This witness brought along a crow bar or halicon tool from the fire department of North Augusta. It was identified by the witness and was identical with the one previously offered in evidence. When the State offered in evidence the crow bar or halicon tool brought from North Augusta by the witness Barber, counsel for the appellants objected and

such objection was overruled by the trial Judge. The appellants assert that it was error to admit as evidence the crow bar or halicon tool identified by and brought from North Augusta by the witness Barber.

After the aforesaid crow bar or halicon tool had been 3,4 offered in evidence, counsel for the appellants cross examined the witness thereabout without reserving the objection thereto previously made. We need not consider whether the evidence given by the witness Barber, or the exhibit offered in evidence, should have been excluded because appellants' counsel cross examined this witness concerning his testimony and the exhibit without reservation of their objection. The objection was thereby lost and if any error had been committed in the admission of the testimony or the exhibit, it was cured. *State v. Cavers*, 236 S. C. 305, 114 S. E. (2d) 401. However, apart from what we have heretofore said on this question, we conclude that the testimony of the witness Barber and the exhibit offered through his testimony was relevant to the issues in this case. This objection is overruled.

All exceptions of the appellants are overruled and the judgment of the lower Court is affirmed.

Affirmed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, JJ.,
concur.

17721

Ex parte Ogden A. RANKIN, Petitioner-Respondent, v. SUPERIOR
AUTOMOBILE INSURANCE CO. OF FLORENCE, S. C.,
Respondent-Appellant. In re David L. STALVEY, Plaintiff, v.
Ruby BUTLER, Defendant.

(117 S. E. (2d) 525)

Action by attorney to require automobile collision insurer to pay him for certain professional services rendered in case involving insured motorist. The Civil Court, Horry

County, Claude M. Epps, J., rendered judgment for attorney and insurer appealed. The Supreme Court, Oxner, J., held that where attorney was employed by motorist on contingent basis, but, after attorney brought suit in behalf of motorist for injuries and damage to automobile, insurer paid motorist sum for damages to automobile, motorist executed subrogation agreement in favor of insurer and insurer was not consulted and had no part in settlement in which attorney received draft payable to joint order of attorney and insurer in amount insurer had paid to motorist, services rendered by attorney to insurer constituted no foundation for claim by attorney against insurer, and, in absence of express contract, attorney was not entitled to recover any portion of draft.

Reversed and petition dismissed.

1. ATTORNEY AND CLIENT.—Generally, a claim of an attorney for professional services must, like a claim for any other service, rest upon contract between the parties, either express or implied, and ordinarily attorneys must look to their clients for compensation.
2. ATTORNEY AND CLIENT.—Where attorney was employed by insured motorist on contingent basis, but, after attorney brought suit in behalf of motorist for injuries and damage to automobile, motorist's collision insurer paid motorist sum for damages to automobile, motorist executed subrogation agreement in favor of insurer and insurer was not consulted and had no part in settlement in which attorney received draft payable to joint order of attorney and insurer in amount insurer had paid motorist, services rendered by attorney constituted no foundation for claim by attorney against insurer, and, in absence of express contract, attorney was not entitled to any portion of draft.

Messrs. Willcox, Hardee, Houck & Palmer and James C. McLeod, Jr., of Florence, for Appellant, cite: As to there being no evidence upon which there could be based a finding that the respondent was employed by, or authorized to represent the interests of, appellant: (S. C.) 114 S. E. (2d) 832; 105 S. C. 475, 81 S. E. 313; 189 S. C. 269, 1 S. E. (2d) 139; 12 Am. Jur., Contracts, Secs. 4, 75; Restatement of the Law of Contracts, Sec. 75; 21 S. C. 162. As to error on part of trial Judge in holding that the respondent

was entitled to an attorney's fee of one-third of the property damage settlement: 216 S. C. 309, 57 S. E. (2d) 638; 16 A. L. R. (2d) 1261; 50 Am. Jur., Subrogation, Secs. 5, 6; 14 R. C. L. 1404; 204 S. C. 496, 30 S. E. (2d) 146, 157 A. L. R. 1255; (S. C.) 114 S. E. (2d) 832; 216 S. C. 309, 57 S. E. (2d) 638, 16 A. L. R. (2d) 1261; 29A Am. Jur., Insurance, Sec. 1724; 5A Am. Jur., Automobile Insurance, Sec. 176.

Ogden A. Rankin, Esq., of Conway, for Respondent.

December 7, 1960.

OXNER, Justice.

This proceeding was commenced by respondent, Ogden A. Rankin, a member of the Conway Bar, to require appellant, Superior Automobile Insurance Company of Florence, South Carolina, to pay him for certain professional services rendered in the case of *David L. Stalvey v. Ruby Butler*. The facts out of which this claim arises are as follows:

On May 12, 1959, near Conway, South Carolina, a collision occurred between the automobiles of David L. Stalvey and Mrs. Ruby Butler. Stalvey employed respondent to represent him on a contingent basis. On May 15th respondent brought suit in behalf of Stalvey against Mrs. Butler for personal injuries sustained by Stalvey and for the damage to his automobile resulting from said collision. On July 2, 1959, appellant, which had insured Stalvey's automobile against loss or damage from collision, paid him the sum of \$1,098.40, representing the damage to his automobile less the sum of \$50.00 set out in the deductible clause. Thereupon Stalvey executed a subrogation agreement in which he "pledged" to appellant all claims for property damages arising out of said collision. Stalvey further stated in this agreement: "I further pledge that I have received no settlement from, nor signed any release for the responsible party, and declare that I will take no such action without the knowledge and consent of the 'company'." On July 8th appellant notified the National Grange Mutual Insurance Company which

carried liability insurance on Mrs. Butler's car of its subrogation claim. On July 15, 1959, the National Grange Mutual Insurance Company acknowledged receipt of appellant's letter of July 8th and further stated: "As you know, your insured and a passenger in your insured vehicle received injuries and are making claim for bodily injury. As soon as these outstanding bodily injury claims are resolved, we will be glad to discuss the matter of your subrogation claim."

On January 20, 1960, the action brought by Stalvey against Mrs. Butler was settled for the sum of \$1,600.00. Appellant was not consulted and had no part in the settlement. At the request of respondent, two drafts were issued by the National Grange Mutual Insurance Company, one payable to the joint order of Stalvey, appellant and respondent for \$1,098.40 and the other for \$501.60, payable to the order of Stalvey and respondent. On the same day respondent wrote appellant a letter outlining the settlement made and claiming that he was entitled to a fee of \$366.13, representing one-third of the appellant's subrogation claim. In this letter he enclosed his personal check to appellant for \$732.27, along with the draft of \$1,098.40 which he asked appellant to endorse and return to him. On January 22nd, appellant wrote respondent denying any liability to him for attorney's fees and returned both the draft and the check.

On January 26, 1960, respondent filed a petition in the Civil Court of Horry County in which he asked that appellant be required to show cause why it should not pay him a reasonable attorney's fee for collecting the sum of \$1,098.40. A rule was issued and a return duly filed by appellant in which it denied ever employing respondent and further stated "that it was looking solely to the National Grange Mutual Insurance Company to make direct settlement with it for its interests." A hearing was had on February 23rd. The testimony disclosed the facts hereinabove related. It further developed from the testimony that Mr. A. L. Hardee, a member of the Florence Bar, was general counsel for appellant on a salary basis with the duty of advising it on all

legal matters including those relating to subrogation agreements, and that some subrogation claims were handled by appellant directly with the interested parties while others were turned over to attorneys for collection under a standard form of collection agreement used by appellant. The only dispute in the testimony related to the extent of the interest which respondent was employed to represent. He says the understanding was that he was to bring suit to recover the entire loss, including all damages to Stalvey's automobile, on a contingent basis of one-third of the recovery. Stalvey denied that respondent was authorized to make any collection in behalf of appellant, stating that he was employed solely to handle his personal injury claim, together with the item of \$50.00 deducted in the collision settlement. The adjuster for appellant said that he thoroughly explained to Stalvey that appellant "would handle the subrogation in its own way."

On June 17th, the Judge of the Civil Court of Horry County issued an order in which he found that respondent was entitled to recover from appellant reasonable attorney's fees for collecting the sum of \$1,098.40, which he fixed at \$366.13, one-third of the amount collected. The case is here on appeal from this order.

The general rule is well settled that a claim of an
1 attorney for professional services, must, like a claim for any other service, rest upon contract between the parties, either express or implied. *Nimmons v. Stewart*, 13 S. C. 445; *Hand v. Savannah & Charleston Railroad Company*, 21 S. C. 162; *Westmoreland v. Martin*, 24 S. C. 238; *Ex parte Lynch*, 25 S. C. 193; *Hubbard v. Camperdown Mills*, 25 S. C. 496, 1 S. E. 5; *Wilson v. Kelly*, 30 S. C. 483, 9 S. E. 523; *Bedford v. Citizens & Southern National Bank*, 203 S. C. 507, 28 S. E. (2d) 405. Under this rule attorneys must ordinarily look to their clients for compensation. "The simple fact that such services have enured to the benefit of others, with whom there is no contract relation, either directly or through some agent or representative, affords no

legal foundation for a charge against such other persons." *Hubbard v. Camperdown Mills*, [25 S. C. 496, 1 S. E. 9] *supra*. There are certain exceptions to this general rule, some of which are lucidly discussed in the case of *Petition of Crum*, 196 S. C. 528, 14 S. E. (2d) 21, but none of them apply to the facts in the instant case.

It seems quite clear that there was no express contract of employment and we do not think there are any circumstances giving rise to an implied contract between respondent and appellant. If we assume, as respondent contends, that under his contract with Stalvey he was to receive one-third of the entire recovery, including damage to the automobile, such contract would not be binding on appellant which was not a party to it. It may be true, as argued by respondent, that appellant could have intervened in the action, *Calvert Fire Insurance Co. v. James*, 236 S. C. 431, 114 S. E. (2d) 832, but its decision not to do so did not have the effect of authorizing respondent to represent its interests. The most that can be said is that the services rendered by respondent incidentally benefitted appellant, but as pointed out in the foregoing cases, such incidental benefits constitute no foundation for a legal claim.

A case somewhat apposite is *Ex parte Lynch*, *supra*, 25 S. C. 193. This was a suit in ejectment. The defendant, upon being advised by his counsel that his title was worthless and could not be sustained, sought to make a compromise settlement with plaintiff. About this time one who held a mortgage given by the defendant on the land was allowed to intervene and successfully defended the ejectment suit. Counsel for the mortgagee then claimed that they were entitled to attorneys' fees from the mortgagor out of the surplus value of the mortgaged land. The claim was denied. In the course of the opinion, the Court quoted the following from *Hand v. Savannah & Charleston Railroad Co.*, *supra*, 21 S. C. 162: "No one can legally claim compensation for voluntary services to another, however beneficial they may be, nor for incidental benefits and advantages to one, flowing

to him on account of services rendered to another, by whom he may have been employed. Before legal charge can be sustained, there must be a contract of employment either expressly made or superinduced by the law upon the facts."

The order of the Court below is reversed and respondent's petition is dismissed.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

17723

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, Appellant, v. W. N. MILLER and Thomas W. Miller, Respondents
(117 S. E. (2d) 561)

Condemnation proceeding brought by State Highway Department. The Common Pleas Court, Greenville County, J. B. Pruitt, J., entered judgment in amount of verdict plus interest and highway department appealed from order allowing interest. The Supreme Court, Moss, J., held that even if just compensation to condemnees included interest, where property was taken by highway department before payment, it was duty of condemnees to call matter of interest to attention of trial Judge and request an interest instruction so that jury could, by their verdict, determine what was just compensation, trial Judge had no authority to add interest to verdict of jury and order adding interest could not be justified as amending or readjusting the verdict.

Reversed.

1. EMINENT DOMAIN.—Section of Constitution to effect that private property shall not be taken for public use without just compensation being first made therefor is applicable where private property is taken for public use by the state, or by any of its agencies, and state may delegate to agencies right to exercise its power of eminent domain and may, by statute, prescribe the manner in which, at instance of such condemnor, just compensation of the condemnee is to be ascertained. Const. art. 1, § 17.
2. EMINENT DOMAIN.—Value of property as of date that it is taken by condemnor furnishes measure of compensation and damages. Const. art. 1, § 17.

3. EMINENT DOMAIN.—In proceeding by State Highway Department to condemn property, it was for jury to determine what was just compensation for the taking. Const. art. 1, § 17; Code 1952, §§ 33-184, 33-135, 33-139.
4. TRIAL.—In condemnation proceedings brought by State Highway Department, even if just compensation to condemnees included interest, where property was taken by highway department before payment, it was duty of condemnees to call matter of interest to attention of trial judge and request an interest instruction so that jury could, by their verdict, determine what was just compensation, trial judge had no authority to add interest to verdict of jury and order adding interest could not be justified as amending or readjusting the verdict. Const. art. 1, § 17; Code 1952, §§ 33-134, 33-135, 33-139.
5. TRIAL.—Court, in condemnation proceeding, cannot add interest to verdict when interest is part of damages and not a mere incident to landowner's claim, nor when it is impossible to ascertain whether jury has awarded interest in an action on unliquidated claim. Const. art. 1, § 17; Code 1952, §§ 33-134, 33-135, 33-139.

Messrs. Daniel R. McLeod, Attorney General, and Grady L. Patterson, Jr., and James S. Verner, Assistant Attorneys General, of Columbia, for Appellant, cite: As to Respondent not being entitled to have interest added to verdict in Highway condemnation proceedings: 110 S. C. 321, 96 S. E. 301; 199 S. C. 458, 20 S. E. (2d) 157; 149 S. C. 219, 146 S. E. 870; 250 N. C. 485, 108 S. E. (2d) 895; 222 N. C. 106, 22 S. E. (2d) 256; 305 S. W. (2d) 688; 53 Am. Jur. 760, Trial, par. 1096; 86 N. E. 783, 25 L. R. A. (N. S.) 311.

Messrs. Thomas A. Wofford and Theodore A. Snyder, Jr., of Greenville, for Respondents, cite: As to landowner, in eminent domain cases, being entitled to compensation in the form of interest from the time of the taking of his property until the entry of judgment: 36 A. L. R. (2d) 337-350; 295 U. S. 103, 55 S. Ct. 681, 79 L. Ed. 1331, rehearing denied 295 U. S. 769, 55 S. Ct. 911, 79 L. Ed. 1709; 154 Wisc. 121, 142 N. W. 476; 190 Ind. 572, 131 N. E. 51; 134 Conn. 226, 56 A. (2d) 512; 52 Iowa 613, 3 N. W. 648; 279 Mich. 285, 271 N. W. 760; 102 Kan. 835, 172 P. 20; 144 Neb. 325, 13 N. W. (2d) 168; 239 Iowa 149,

30 N. W. (2d) 743; 140 Kan. 520, 38 P. (2d) 675; 326 P. (2d) 902; 137 Conn. 442, 78 A. (2d) 546; 88 Tenn. 510, 13 S. W. 123; 61 Iowa 637, 17 N. W. 26; 13 Neb. 317, 14 N. W. 407; 86 N. H. 512, 171 Atl. 761; 119 S. C. 319, 112 S. E. 55; 226 Ind. 319, 79 N. E. (2d) 392; 127 Ohio St. 453, 189 N. E. 116; 279 Mich. 285, 271 N. W. 760; 159 S. C. 481, 157 S. E. 842; 352 Pa. 143, 42 A. (2d) 585; 222 Ark. 9, 257 S. W. (2d) 37; 205 La. 1029, 18 So. (2d) 605; 40 Mont. 254, 106 P. 5; 90 Kan. 757, 136 P. 253; 168 Kan. 100, 211 P. (2d) 70; 305 S. W. (2d) 688; 292 S. W. (2d) 904; 300 S. W. (2d) 480; 324 S. W. (2d) 697; 144 Neb. 325, 13 N. W. (2d) 168; 142 Neb. 859, 8 N. W. (2d) 201; 239 Iowa 149, 30 N. W. (2d) 743; 246 Iowa 416, 68 N. W. (2d) 69; 143 Minn. 392, 173 N. W. 713; 24 Minn. 311; 142 Ga. 662, 83 S. E. 524; 63 Iowa 443, 19 N. W. 325; 88 Tenn. 510, 13 S. W. 123; 200 Okla. 521, 197 P. (2d) 985; 222 Ark. 9, 257 S. W. (2d) 37; 197 Tenn. 555, 276 S. W. (2d) 722; 303 S. W. (2d) 804; 140 Kan. 520, 38 P. (2d) 675.

December 9, 1960.

Moss, Justice.

W. N. Miller and Thomas W. Miller, the respondents herein, owned a lot of land containing 1.21 acres, located in Greenville County, South Carolina, and fronting on Highway No. I-85. The South Carolina State Highway Department, the appellant herein, instituted this condemnation proceeding on June 4, 1958, by the service of a notice upon the respondents that it required the aforesaid lot of land for highway purposes. This proceeding was instituted pursuant to Section 33-122 of the 1952 Code of Laws of South Carolina, and the notice given was in conformity with Section 33-132 of the Code. A Board of Condemnation was duly convened and did, by appropriate resolution served upon the respondents on June 27, 1958, fix the amount of compensation and damages to which the respondents were

entitled in the amount of \$7,200.00. The respondents herein appealed to the Court of Common Pleas for Greenville County from the award made by the Condemnation Board and the cause was heard *de novo*, pursuant to Section 33-139 of the Code, before the Honorable J. B. Pruitt, Presiding Judge, and a jury, resulting in a verdict in favor of the respondents in the amount of \$11,865.00.

Immediately following the rendition of the verdict in favor of the respondents, in the amount above stated, they made a motion that interest be added at the rate of six per cent per annum from January 30, 1959, this being the date that the appellant made actual entry upon and took possession of the lot of land above referred to for highway purposes. The trial Judge ruled that interest was allowable and judgment was entered for the amount of the verdict plus interest from January 30, 1959 to April 6, 1960, to run until the verdict was paid. The amount of the verdict was paid on April 28, 1960. Timely notice of intention to appeal to this Court from the Order allowing interest was given by the appellant.

We should state that upon an appeal being made by the respondents from the award made by the Board of Condemnation, that the appellant tendered to them the amount of the award as made by said Board. Upon the refusal of the respondents to accept such award, the sum of \$7,200.00 was set aside, pending the outcome of the appeal, and the appellant proceeded with the work of the construction of the highway. Section 33-140 of the Code.

It is the position of the appellant that it was error for the Court, after the rendition of a verdict in favor of the landowners, to find as a matter of fact and law that interest was due on such verdict from the date of the taking, January 30, 1959, the error being that interest is not recoverable under the condemnation statutes, Sections 33-122 *et seq.*, of the 1952 Code of Laws of South Carolina. It is the further contention of the appellant that under Section 33-139 of the

Code, the verdict of the jury was final and embraced all damages accrued to the date thereof, which was April 6, 1960.

Article I, Section 17 of the 1895 Constitution of this State, provides that: "Private property shall not be taken * * * for public use without just compensation being first made therefor." This section is applicable where private property is taken for public use by the State, or by any of its agencies. The State may delegate to its agencies the right to exercise its power of eminent domain and may, by statute, prescribe the manner in which, at the instance of such condemnor, the "just compensation" of the condemnee is to be ascertained. *Smith v. City of Greenville*, 229 S. C. 252, 92 S. E. (2d) 639.

In tracing the evolution of the "just compensation" provision as is contained in Article I, Section 17 of the 1895 Constitution of this State, this Court in the case of *Wilson v. Greenville County*, 110 S. C. 321, 96 S. E. 301, 303, said:

"It was decided in this state, as early as 1796, that, in the absence of a constitutional requirement that compensation should be made, the Legislature has the power, in the exercise of the state's right of eminent domain, to take private lands for public highways without compensation. *Lindsay v. Commissioners*, 2 Bay 38; *Stark v. McGowan*, 1 Nott & McC. 387 [397]; *Patrick v. Commissioners*, 4 McCord 541; *State v. Dawson*, 3 Hill 100. In *Lindsay's case*, the Court said:

"'Every freeholder, holding lands under the state, holds them upon condition of yielding a portion of them, when wanted for the public roads and highways.'

"In *State v. Dawson* (decided in 1835) this right of the state was reaffirmed, after elaborate consideration by all the judges of the state, and it appears from numerous statutes that the Legislature exercised this right for nearly 200 years, from the days of the lords proprietors until the adop-

tion of the Constitution of 1868. Since that time, we have had of force the constitutional provision that private property shall not be taken for public use without just compensation.

"But the Constitution does not define just compensation, or prescribe how it shall be made, except where the taking is for the use of a private or *quasi*-public corporation.
* * *"

In the case of the *City of Spartanburg v. Belk's Department Store et al.*, 199 S. C. 458, 20 S. E. (2d) 157, 164, it was said:

"It is evident that there must be a final determination of the amount of just compensation to be made, which can only be done under the provisions of the Act of the Legislature, * * *"

It was further said in the cited case, that:

"In our opinion, under the provisions of Article I, Section 17, of the Constitution of 1895, it is left to the Legislature to enact procedure by which private property may be condemned for public use together with the means by which just compensation is to be made. * * *"

It was further held in the cited case that a Circuit Judge has no authority, under the law, to determine the issue of just compensation. In the instant case, the respondents elected to have just compensation determined by the verdict of a jury, as is provided in Sections 33-134 and 33-139 of the Code. These sections are a part of the procedure which the Legislature has enacted, by which private property may be condemned for a public use and just compensation fixed.

Section 33-135 of the Code, relating to condemnation of property by the State Highway Department for roads, provides: "In assessing compensation and damages for rights of-way, only the actual value of the land to be taken therefor and any special damages resulting therefrom shall be considered." It is manifest that where a landowner's com-

pensation is ascertained in a condemnation proceeding instituted by the appellant herein, because of the taking, it is still referable to Article I, Section 17, of the Constitution, and the appropriate statute prescribing the measure of "just compensation" thereunder.

After the Board of Condemnation had fixed the
2, 3 amount of compensation and damages to which the respondents were entitled, the State Highway Department went into possession of the condemned property on January 30, 1959. This is the date when the taking occurred and fixed the point at which damages should be assessed because it is the value of the respondents' property taken as of that date which furnishes the measure of compensation and damages. *Board of Commissioners of Fairfield County v. Richardson*, 122 S. C. 58, 114 S. E. 632, and *Howell v. State Highway Department*, 167 S. C. 217, 166 S. E. 129. In the last cited case it was held that the method of the final fixing of "just compensation" is by the verdict of a jury, which arrives at such verdict by finding the right conclusion from a consideration of the facts, and then applying its findings of fact to the law as the trial Judge has given it. Therefore, it was for the jury to determine what was "just compensation" for the taking of the lands of the respondents for highway purposes. In this connection attention is called to Section 33-139 of the Code, which provides: "* * * The verdict of the jury in such cases shall be final, unless set aside for the reasons for which verdicts may be set aside in other cases. * * *"

It has been held in numerous cases that just
4 compensation includes interest where the property is taken before payment. See the cases so holding cited in 36 A. L. R. (2d) beginning at page 451. Assuming, without deciding, that the foregoing rule is applicable in this State, it was the duty of the respondents to call the matter of interest on the award to the attention of the trial Judge and request an instruction upon such so that the jury could, by their verdict, determine what was "just com-

pensation". In *State v. Deal*, 191 Or. 661, 233 P. (2d) 242, it was held that in condemnation proceedings that the property owners have the duty to call the matter of interest on the award to the attention of the trial court and request an instruction upon such matter, so that the jury, by their verdict, might find a fair cash market value of the property involved plus interest thereon at the legal rate from the day of the taking.

In 36 A. L. R. (2d) at page 469, it is said:

"A question that has arisen quite frequently is whether or not a court may add interest after the jury has returned a verdict for a gross sum.

"It appears to be well settled that when there is nothing in the record from which it can be definitely ascertained that the jury did not take into consideration the question of interest in fixing the amount of their verdict, even if no instructions in regard to interest were given by the court, the court cannot after verdict add interest to the sum found by the jury. The reason for this rule obviously is that the presumption is that the verdict includes interest."

The foregoing rule is supported by decisions in many jurisdictions. *Fishel v. Denver*, 106 Colo. 576, 108 P. (2d) 236; *Moll v. Sanitary Dist.*, 228 Ill. 633, 81 N. E. 1147; *State ex rel. McNutt v. Orcutt*, 211 Ind. 523, 199 N. E. 595, 7 N. E. (2d) 779; *Lough v. Minneapolis & St. L. R. Co.*, 116 Iowa 31, 89 N. W. 77; *Minot v. Boston*, 201 Mass. 10, 86 N. E. 783, 25 L. R. A., N. S., 311; *Mississippi State Highway Comm. v. Treas.*, 197 Miss. 670, 20 So. (2d) 475; *Butte Electric R. Co. v. Matthews*, 34 Mont. 487, 87 P. 460; *Durham v. Davis*, 171 N. C. 305, 88 S. E. 433; *Blackwell, E. & S. W. R. Co. v. Bebout*, 19 Okl. 63, 91 P. 877; *Santangelo v. Montgomery County*, 23 Pa. Dist. & Co. R. 1; *Routh v. Texas Traction Co.*, Tex. Civ. App., 148 S. W. 1152; *Bridgeman v. Hardwick*, 67 Vt. 653, 32 A. 502; *State by, State Road Comm. v. Painter*, 120 W. Va. 486, 199 S. E. 372; *Diedrich v. Northwestern Union R. Co.*, 47 Wis. 662, 3 N. W. 749.

In the case of *Mississippi State Highway Comm. v. Treas.*, *supra*, it was held that the question of granting prior interest as an element of damage, should be submitted to and passed upon by the jury in condemnation proceedings; that the amount of the verdict constituted the total damage fixed by the jury, and that the trial Judge had no power to add thereto prior interest nor to fix the rate of interest.

In the case of *Minot v. Boston*, *supra*, it was said:

"It is to be borne in mind that the whole question of the amount of damages was before the jury. They were the tribunal to determine it, and the only tribunal, and hence it was not only in their power, but it was their duty to fix the amount due. Their verdict, therefore, so long as it stands, is the only authoritative announcement of that amount. And that is so, whether or not every element of damage in the way of interest or otherwise was placed before the jury, or whether the instructions to them were right or wrong, complete or defective. The parties have tried the case as they saw fit, and they made no objection to the charge nor asked for further instructions.

"It is to be further noted that this is the verdict upon which, so long as it stands, judgment is to be entered. No authority is given to add to this verdict a further sum. The assessment of the amount due is not to be made in part by the jury and in part by the court, but wholly by the jury. As an assessment made by the court, therefore, it cannot stand. The only plausible ground upon which the order can stand is not that it is an addition to the assessment made by the jury, but that it may be regarded as an amendment to the verdict, or, in other words, that the verdict actually rendered shall not stand as given but shall be so amended as to stand as the court thinks it ought to have been given.

" * * * The judge cannot, under the guise of amending the verdict, invade the exclusive province of the jury or substitute his verdict for theirs. * * * After the amendment the verdict must be not merely what the judge thinks it ought to have been, but what the jury intended it

to be. Their actual intent, and not his notion of what they ought to have intended, is the thing to be expressed and worked out by the amendment.

“ * * * The amendment in the present cases increases the verdict rendered by the jury more than one-third. It is a change in substance, and not in form. * * * It cannot be known whether the jury would have arrived at the amount named in the verdict if they had supposed that it would be largely increased by the court. A verdict is the product of the minds of twelve men, and, to a certain extent, especially in a case like the present, frequently represents a result which no individual member of the panel would have reached in the first instance if free to follow his own judgment. It is a conclusion to which he can consistently assent, although if left entirely to himself he would perhaps have preferred a different result. It is by no means certain that if the jury had known that the sum which they were to find due was to be increased more than one-third, they would have found the amount they did.”

In the case of *State by, State Road Comm. v. Painter, supra*, [120 W. Va. 486, 199 S. E. 374] it appeared that an actual entry was made upon the condemned lands prior to March 24, 1936. The jury returned a verdict for the landowners and they then moved that interest be added to the verdict from said date. The trial Judge refused such motion and the landowners appealed. In affirming the order of the lower Court refusing interest, the Court said:

“ * * * The trial court, upon motion of the parties, or *ex mero motu*, could have directed the jury to include interest from the date of taking, or reserved that matter to itself in the entry of the judgment on the verdict. Not having entertained either course, the court had no justification for the addition of interest to the amount of the verdict.”

The order of the Circuit Judge adding interest to the amount found by the jury cannot be justified as amending or readjusting the verdict. In the case of *Middleton & Co.*

v. Atlantic Coast Line R. Co., 133 S. C. 23, 130 S. E. 552, 556, this Court said:

"Where in a law case the verdict * * * is for an amount greater than the defendant conceives it should have been, his remedy is to move for a new trial, and upon that motion the circuit judge may either order a new trial out and out, or order a new trial *nisi*, requiring the plaintiff at his option to remit a certain portion of the verdict or submit to a new trial. Should the circuit judge refuse the motion, upon a legal ground, the defendant has his remedy by appeal to this court, which may either affirm or reverse the order below. In the event of affirmance, the case is ended; in the event of reversal, the court may remand the case, either directing a new trial or a new trial *nisi*. So where the verdict is for an amount less than the plaintiff conceives it should have been, the remedy of the plaintiff is exactly the same.

"This court has no power to readjust a verdict in a law case except in the manner indicated, and that is only through its power to order a new trial conditioned upon the refusal of the terms imposed. It grants a new trial *nisi* in favor of the defendant, unless the plaintiff should reduce the verdict, for the reason that it has no absolute control over the verdict; it cannot readjust it against the will of the plaintiff by reducing it. If it cannot reduce the verdict, it seems clear that it cannot increase it upon the plaintiffs' motion, except indirectly in the manner stated."

In the case of *Anderson v. Aetna Casualty & Surety Company et al.*, 175 S. C. 254, 178 S. E. 819, 829, the Court said:

"Although the court may amend a verdict, the amendment must be accompanied with an option of a new trial *nisi* to the party against whom amendment militates. *Joiner v. BeVier*, 155 S. C. 340, 152 S. E. 652; *Lorick & Lowrance, Inc., v. Julius H. Walker & Co.*, 153 S. C. 309, 150 S. E. 789, 792; *Middleton & Co. v. A. C. L. Ry. Co.*, *supra* [133 S. C. 23, 130 S. E. 552]; *Gwathmey v. Foor Hotel*

Co., 121 S. C. 237, 113 S. E. 688, 689; *Hall v. Northwestern Railroad Co.*, 81 S. C. 522, 62 S. E. 848, 853; *Levi v. Legg, supra* [23 S. C. 282]; *Warren v. Lagrone*, 12 S. C. 45, 51; 27 Ruling Case Law, 877, 878.

“The Judge cannot, under the power of amending the verdict, invade the province of the jury or substitute his verdict for theirs.’ *Lorick & Lowrance, Inc., v. Julius H. Walker & Co., supra.*”

We have in this case, assumed that interest is a part
 5 of just compensation to which the property owner is entitled and dates from the time of the taking until the time of the payment for the property so taken. It was so held in the case of *United States v. Rogers*, 255 U. S. 163, 41 S. Ct. 281, 65 L. Ed. 566, and *Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299, 43 S. Ct. 354, 67 L. Ed. 664. The Court cannot add interest to the verdict when the interest is a part of the damages and not a mere legal incident to the landowner’s claim, nor when it is impossible to ascertain whether the jury has awarded interest in an action on an unliquidated claim. 53 Am. Jur., Trial, Section 1096, at page 760. *Washington & G. R. Co. v. Harmon’s Adm’r*, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284.

We conclude that the trial Judge had no authority or power to add interest to the verdict of the jury in this case, because interest being a part of the just compensation to which the landowner was entitled, such should have been submitted, under appropriate instructions, for the consideration of the jury in fixing damages.

In view of the conclusion we have heretofore reached, it becomes unnecessary for us to determine whether a property owner, whose property was taken in a condemnation proceeding for public use, is entitled to interest from the time of the taking until the amount of the just compensation is fixed and determined by the verdict of a jury.

We conclude under the record in this case and the procedure invoked that the respondents were not entitled to

an order of the lower Court adding interest to the amount of the verdict as found by the jury.

The judgment of the lower Court is reversed and the Order granting interest is vacated.

Reversed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, JJ., concur.

17724

J. D. WILLIAMS, Appellant, v. Eugene KALUTZ, Respondent
(117 S. E. (2d) 591)

Action by pedestrian for personal injuries allegedly suffered when he was struck by automobile while crossing a street on the marked crosswalk. From a judgment of Common Pleas Court, Richland County, J. Woodrow Lewis, J., for automobile driver, pedestrian appealed. The Supreme Court, Oxner, J., held that where automobile had struck pedestrian while proceeding at a speed of five to ten miles an hour after negotiating a left turn onto street which pedestrian was crossing issues of pedestrian's contributory negligence as well as driver's negligence were for jury.

Affirmed.

1. AUTOMOBILES.—The fact that a pedestrian having the right-of-way is in a marked crosswalk when injured does not necessarily show freedom from contributory negligence, and even though a pedestrian in such a position is in a preferential status, such status is only a circumstance to be considered by jury in determining whether or not pedestrian was guilty of contributory negligence. Code 1952, § 46-306.
2. TRIAL.—In passing upon the question of whether a directed verdict should be granted, testimony and all reasonable inferences to be drawn therefrom must be considered in the light most favorable to party opposing such motion for directed verdict, and any doubt or uncertainty as to the conclusions to be drawn therefrom must be resolved in such party's favor.
3. AUTOMOBILES.—In action by pedestrian who had been struck while crossing street along a marked crosswalk by an automobile driven

by defendant who was proceeding at a speed of five to ten miles an hour after negotiating a left turn, issues of negligence of automobile driver and contributory negligence of pedestrian were for jury.

Messrs. McKay, McKay, Black & Walker, of Columbia, for Appellant, cite: *As to error on part of trial Judge in refusing to direct a verdict for the plaintiff on the question of liability*: 119 S. E. 905, 126 S. C. 312; 20 S. E. (2d) 395, 200 S. C. 7; 120 S. E. 848, 127 S. C. 205; 66 S. E. (2d) 322, 220 S. C. 26. *As to error on part of trial Judge in submitting the issue of contributory negligence to the jury*: 43 S. E. (2d) 307, 65 S. C. 1; 25 S. C. 53; 19 S. C. 20, 45 Am. Rep. 754; 133 Col. 166, 292 P. (2d) 746; 1 Strob. 389. *As to error on part of trial Judge in refusing the plaintiff's motion for a new trial*: 29 S. E. (2d) 760, 204 S. C. 433; 44 S. E. 380, 66 S. C. 61.

Messrs. Nelson, Mullins & Grier, of Columbia, for Respondent, cite: *As to the trial Judge being correct in refusing to direct a verdict for plaintiff*: 204 S. C. 537, 30 S. E. (2d) 499; *Blashfield's Cyclopedia of Automobile Law and Practice*, Vol. 10A, Sec. 6611; 96 A. L. R. 786; 129 Ohio St. 8, 193 N. E. 644, 96 A. L. R. 782; 179 Iowa 1223, 162 N. W. 783; 116 S. C. 41, 106 S. E. 854; 228 S. C. 45, 88 S. E. (2d) 780. *As to the trial Judge properly submitting the issue of contributory negligence to the jury*: 5 Am. Jur., 760, Sec. 451; 171 S. C. 110, 171 S. E. 604; 159 S. C. 1, 155 S. E. 136; 170 S. C. 164, 169 S. E. 889; 172 S. C. 468, 174 S. E. 394; 217 S. C. 389, 60 S. E. (2d) 844. *As to order refusing new trial not being appealable*: 167 S. C. 500, 166 S. E. 629; 109 S. C. 396, 96 S. E. 144.

December 12, 1960.

OXNER, Justice.

This is an action to recover damages for personal injuries alleged to have been sustained by a pedestrian from the impact of an automobile while crossing a street inter-

section. Trial by jury resulted in a verdict for defendant. From the judgment entered thereon, the plaintiff has appealed. The major question presented is whether the Court erred in refusing to peremptorily instruct the jury that the undisputed evidence showed liability on the part of defendant, leaving open only the question of damages. The trial Judge submitted to the jury both the issue of negligence on the part of defendant and that of contributory negligence on the part of the plaintiff.

The accident occurred on October 21, 1957, about two o'clock on a clear afternoon, at the intersection of Hampton and Assembly Streets in the City of Columbia. Assembly Street, which is about 100 feet wide, runs north and south. Except at the intersections, there is a cement "island" running through the middle of the street which separates north and southbound traffic. There are five lanes on each side between the curb and the median. The lanes next to the curbing and the median are used for parking, leaving three traffic lanes between the two parking lanes. Hampton Street runs east and west. The testimony does not show its width but it is not as wide as Assembly Street. There are traffic lights at this intersection.

Plaintiff, appellant here, is a man in his early fifties. He was formerly a railroad postal clerk but became disabled as a result of injuries sustained in several train accidents. His locomotion was impaired. On the day in question he walked to the northeastern corner of the intersection and after waiting for the light to change to green proceeded westerly on a marked crosswalk with the intention of getting his car which was parked on the other side of Assembly Street. Defendant, respondent here, was traveling east on Hampton Street. When he reached the southwest corner of the intersection, the traffic light was green. He proceeded across the western side of Assembly Street, intending to make a left turn and go north on Assembly. Before completing his turn, he had to stop for cars going westerly across Assembly Street. As soon as the light changed to green

so as to give the Assembly Street traffic the right of way, he started his car. When he had proceeded only a very short distance, plaintiff came in contact with his right front fender. At this time plaintiff was in the crosswalk and had reached a point about two-thirds the distance across the eastern side of Assembly Street.

Plaintiff testified that when he reached the third traffic lane, he saw a car "cutting the corner" at a "terrific" speed, that to avoid being hit he "stepped back", and "I put out my hands and hit my wrist on his right front fender, and it knocked me up in the air." He says he "was probably over halfway in the path of the car when I saw it coming", but declined to estimate how far away defendant's car was at that time. He admits he did not fall but says his "right leg gradually gave away" and that he sat down on the street at the point of the impact. According to him, the defendant's car traveled about two car lengths after the accident.

Plaintiff's testimony is contradicted to some extent by one of his own witnesses who testified that defendant's car was not going fast and only traveled about five feet after the accident.

Defendant testified that he entered the intersection from Hampton Street on a green light; that there was only the normal amount of traffic; that as he crossed the western side of Assembly Street, he gave a hand signal of intention to make a left turn; that he stopped near the middle of the street to permit traffic going west on Hampton Street to pass; that after the light changed he turned left to go north in the traffic lane on Assembly nearest the median, traveling only five or ten miles an hour; that as he made this turn, he "heard a noise against the side of his automobile", immediately looked back and saw the plaintiff standing in the street; and that he stopped within four or five feet. He says he then moved his car out of the traffic and offered assistance to plaintiff. He admitted that he

never saw plaintiff prior to the accident and said the dust marks on his car indicated that the impact occurred on "the right front fender about halfway back." He denied that his automobile struck the plaintiff, stating, "I wouldn't say my automobile struck Mr. Williams as much as it would be that Mr. Williams put out his hands and hit my automobile." It seems to be conceded that the automobile never touched plaintiff's body.

Plaintiff claims that his preexisting physical condition was considerably aggravated by the impact. There is other testimony to the effect that his injury, if any, was only trivial.

It must be conceded that plaintiff had the right of way. Section 46-306 of the 1952 Code. But although preferred by the statute, he was not relieved of the duty of exercising ordinary care for his own safety. *Sims, Administrator v. Eleazer*, 116 S. C. 41, 106 S. E. 854, 24 A. L. R. 1293; *Branham v. Wolfe Transportation Co.*, 170 S. C. 164, 169 S. E. 889; *Lawter v. War Emergency Co-operative Association*, 213 S. C. 286, 49 S. E. (2d) 227; *Gillespie v. Ford*, 222 S. C. 46, 71 S. E. (2d) 596; *Smith v. Canal Insurance Co.*, 228 S. C. 45, 88 S. E. (2d) 780; *Carma v. Swindler*, 228 S. C. 550, 91 S. E. (2d) 254. In a concurring opinion in *North State Lumber Co. v. Charleston Consolidated Railway & Lighting Co.*, 115 S. C. 267, 105 S. E. 406, 408, it was stated: "The erroneous notion seems to be prevalent that, if one has the right of way, as it is called, he may proceed without regard to circumstances, conditions, or consequences. Even when one has the right of way, he is still bound to exercise due care for his own safety, and to prevent injury to others."

In line with the foregoing authorities, it has been
1 rather uniformly held that the fact that a pedestrian having the right of way is in a marked crosswalk when injured does not necessarily show freedom from contributory negligence. The question is generally one of fact

for determination by a jury. Annotations 96 A. L. R. 786; 164 A. L. R. 269; 5A Am. Jur., Automobiles and Highway Traffic, Sections 756, 760 and 761. Of course, the preferential status of such pedestrian is a circumstance to be considered by the jury in determining whether or not he is guilty of contributory negligence.

In passing upon the question of whether the Court
2 should have directed a verdict for plaintiff on the issue of liability, the testimony and all reasonable inferences to be drawn therefrom must be considered in the light most favorable to defendant and any doubt or uncertainty as to the conclusions to be drawn therefrom must be resolved in his favor. *Green v. Bolen*, S. C., 115 S. E. (2d) 667.

In the light of the foregoing principles, we do not
3 think it can be said as a matter of law that plaintiff was free from contributory negligence. It may be reasonably inferred from the testimony that while defendant was making a left turn with nothing ahead in his path, at a speed of about five or ten miles an hour, plaintiff blindly walked into the front side of his car, and that such a slowly moving car should have been observed by plaintiff in time to have avoided the impact.

Beck v. Dye, 200 Wash. 1, 92 P. (2d) 1113, 127 A. L. R. 1022, involved facts similar in many respects. This was a suit by a pedestrian to recover damages for personal injuries sustained when she came in contact with the right side of defendant's car as she was crossing a street within a crosswalk on a green light. The Court held that it was for the jury to determine whether she was guilty of contributory negligence.

Having concluded that the issue of contributory negligence was properly submitted to the jury, it follows that there was no error in the refusal of a peremptory instruction to the effect that the defendant was liable. It is, therefore, unnecessary for us to determine whether the evidence conclusively shows negligence on the part of defendant.

The remaining exceptions relate to the order of the Court refusing plaintiff's motion for a new trial. It is contended that this order was based upon the ground that the jury could have concluded that plaintiff sustained no damage when in fact the undisputed evidence was to the contrary. But the order was also based upon the ground that the evidence reasonably supported a conclusion of no liability. Certainly it cannot be said that there was an abuse of discretion in refusing the motion on the ground last mentioned.

Affirmed.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

17725

ATLANTA AND CHARLOTTE AIR LINE RAILWAY COMPANY
and Southern Railway Company, Appellants, v. SPARTANBURG
TERMINAL COMPANY, Respondent.

(117 S. E. (2d) 574)

Proceeding by one railroad to enjoin a second railroad from proceeding with condemnation of right of way and ancillary temporary surface easements for the construction of the crossing of tracks of the two railroads by means of a tunnel. Second railroad filed demurrer. The Common Pleas Court, Spartanburg County, J. Woodrow Lewis, J., sustained demurrer, and second railroad appealed. The Supreme Court, Stukes, C. J., held that under statute providing that Public Service Commission should regulate and control by special order in each case the manner in which any railroad track may cross any railroad track, second railroad was not entitled to condemn right of way and ancillary temporary surface easements for construction of a crossing without first obtaining authority of Public Service Commission, even though the railroad had first obtained certificate of public convenience and necessity from federal Interstate Commerce Commission.

Reversed.

1. EMINENT DOMAIN.—Under statute providing that Public Service Commission should regulate and control by special order in each case the manner in which any railroad track may cross any railroad track, railroad was not entitled to condemn right-of-way and ancillary temporary surface easements for construction of a crossing of tracks of another railroad by means of a tunnel without first obtaining authority of Public Service Commission, even though the railroad had first obtained certificate of public convenience and necessity from federal Interstate Commerce Commission. Code 1952, § 58-991; Interstate Commerce Act, § 1(20), 49 U. S. C. A. § 1(20).
2. RAILROADS.—The legislative purpose of statute providing that Public Service Commission should regulate and control manner in which any railroad track may cross any railroad track was to insure the safety and convenience of the citizens of the State, and the statute was a proper exercise of the police power. Code 1952, § 58-991.
3. COMMERCE.—The exclusive jurisdiction of the Interstate Commerce Commission over railroads does not deprive the state of its police power to regulate reasonably the location and construction of crossing by one railroad of another's tracks, in order, in good faith, to insure the maximum safety and convenience of the public. Code 1952, § 58-991; Interstate Commerce Act, § 1(20), 49 U. S. C. A. § 1(20).
4. RAILROADS.—Statutory jurisdiction of the State Public Service Commission to regulate the "crossing" by one railroad of another is not restricted to crossings at grade, but extends to crossing by underpass or overpass as well. Code 1952, §§ 58-991, 58-992.

See publication Words and Phrases, for other judicial constructions and definitions of "Crossing."

Messrs. William C. Bennett, Jr., of Washington, D. C., Frank G. Tompkins, Jr., of Columbia, and Sam R. Watt, of Spartanburg, for Appellants, cite: As to necessity for special order from Public Service Commission in instant case: 292 U. S. 57, 54 S. Ct. 573, 78 L. Ed. 1123; 260 U. S. 566, 40 S. Ct. 36, 63 L. Ed. 1142; 198 F. (2d) 854; 289 U. S. 76, 53 S. Ct. 516, 77 L. Ed. 1042. As to complaint stating cause of action for injunctive relief: 159 S. C. 1, 156 S. E. 1; 148 S. C. 488, 146 S. E. 411; 222 S. C. 289, 72 S. E. (2d) 576. As to condemnation statutes being strictly construed against the condemnor: 169 S. C. 198, 168 S. E. 554. As to appellants' only remedy being by means of injunction proceedings: 222 S. C. 289, 72 S. E. (2d) 576.

Messrs. Jesse W. Boyd and Means & Browne, of Spartanburg, for Respondent, cite: As to Article 9, Section 6, of the Constitution of the State of South Carolina of 1895 clearly giving one railroad the right to intersect with or cross any other railroad: 89 S. C. 472, 72 S. E. 18. As to construction of statutes regarding railroad crossings: 237 S. C. 75, 115 S. E. (2d) 685; 70 P. 939, 67 Kan. 569. As to in the absence of specific statutory delegation of authority to South Carolina Public Service Commission, it has no jurisdiction to regulate the operation of railroads: 97 S. C. 77, 81 S. E. 314; 202 S. C. 207, 24 S. E. (2d) 353; 289 U. S. 121, 53 S. Ct. 536, 77 L. Ed. 1075; 289 U. S. 76, 53 S. Ct. 516, 77 L. Ed. 1042. As to trial Judge properly sustaining the demurrer: 41 S. C. 241, 50 S. E. 775; 62 S. C. 52, 39 S. E. 780; 142 S. C. 284, 140 S. E. 560; 110 S. C. 449, 96 S. E. 685; 222 S. C. 289, 72 S. E. (2d) 576.

December 12, 1960.

STUKES, Chief Justice.

This case turns upon whether one railroad corporation may cross by its track the right of way and tracks of another railroad without prior order of the State Public Service Commission. We think that it cannot, perforce Sec. 58-991 of the Code of Laws of South Carolina of 1952, which follows:

"The Public Service Commission shall regulate and control by special order in each case the manner in which any street railway or other railroad track may cross any railroad track and the manner of constructing culverts under any railroad so as to effect proper drainage of adjacent territory."

The legislative purpose is manifest and is a proper exercise of the police power to insure the safety and convenience of the citizens of the State. It is peculiarly appropriate here because the plan is to effect the crossing by means of a tunnel, at an acute angle, under the exist-

ing tracks of appellants within the populous city of Spartanburg.

The question arises upon appeal from the sustention of demurrer to appellants' complaint for injunction against respondent's proceeding in condemnation of the right of way and ancillary temporary surface easements for construction purposes. An allegation of the complaint is, par. 17, that the respondent, quoting, "has not obtained the necessary authority of the South Carolina Public Service Commission before construction of said tunnel." The lower court was of opinion that such Commission approval is unnecessary because respondent has obtained certificate of public convenience and necessity of the federal Interstate Commerce Commission, citing the Interstate Commerce Act, § 1(20), 49 U. S. C. A. § 1(20), and *Transit Commission et al. v. United States et al.*, 289 U. S. 121, 53 S. Ct. 536, 77 L. Ed. 1075. In this we think there was error.

It is elementary that the Interstate Commerce Commission has exclusive jurisdiction over the extension
3 of the lines of railroads that are engaged in interstate transportation, which those here concerned are; but it does not follow that the State is thereby deprived of its police power to regulate reasonably the location and construction in order, in good faith, to insure the maximum safety and convenience of the public. No authority has been cited, and we know of none, which so holds. On the other hand, in *St. Louis Southwestern Ry. Co. v. Missouri Pac. R. Co.*, 289 U. S. 76, 53 S. Ct. 516, 517, 77 L. Ed. 1042, the Supreme Court upheld the authority of the State of Arkansas to "fix the point and manner of (the) crossing" of one railroad by another, without prejudice, of course, to the exclusive jurisdiction of the Interstate Commerce Commission to grant or refuse permission (certificate) for the construction if it be an extension of a line engaged in interstate commerce and therefore within the federal statute. We quote, in part, the conclusion of the court: "For the reasons stated, we are of opinion that the judgment of the

Supreme Court of Arkansas [185 Ark. 824, 49 S. W. (2d) 1054], as it directed merely that an order be entered fixing the place and manner of the crossing, is not in conflict with the federal law, whether the proposed track is a spur or an extension." The pertinent provisions of the Arkansas constitution and statute and ours are similar.

The location and manner of construction of the crossing of one railroad by another appears not to be within the scope of the federal act, as it is within our state laws. The purpose of the federal act is well stated in *Union P. R. Co. v. Denver & Rio Grande W. R. Co.*, 10 Cir., 198 F. (2d) 854, 858, as follows, and it excludes the right to regulate which is here asserted:

"The underlying purpose of the provision contained in paragraph (18) of the Act forbidding the construction of an extension of an existing line without first obtaining a certificate of convenience and necessity was to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service; to protect interstate carriers from weakening themselves by constructing and operating superfluous lines, and to protect them from being weakened by another carrier operating in interstate commerce a competing line not required in the public interest; and to preserve well-balanced competition among competing carriers, that being deemed in the public interest. *Texas & Pacific Railway Co. v. Gulf, Colorado & Sante Fe Railway Co.*, 270 U. S. 266, 46 S. Ct. 263, 70 L. Ed. 578; *Texas & New Orleans Railroad Co. v. Northside Belt Railway Co.*, 276 U. S. 475, 48 S. Ct. 361, 72 L. Ed. 661; *Chesapeake & Ohio Railway Co. v. United States*, 283 U. S. 35, 51 S. Ct. 337, 75 L. Ed. 824; *Interstate Commerce Commission v. Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14, 53 S. Ct. 266, 77 L. Ed. 588."

- Respondent would limit the purview of Sec. 58-991,
4 *ante*, to grade crossings because the earlier-enacted,
but following Sec. 58-992 is so restricted by its terms.

It refers to crossing "at the same level"; Sec. 58-991 does not. Respondent would modify the meaning of Sec. 58-991 by the restriction contained in Sec. 58-992, which seems to us illogical, as would the result which would be that the Public Service Commission has jurisdiction to regulate the crossing by one railroad of another at grade but not by overpass or underpass (tunnel). To state the proposition seems to us to refute it.

Respondent reminds us that the jurisdiction of the Public Service Commission is dependent upon statute; it has no inherent jurisdiction. *Piedmont & N. Ry. Co. v. Scott*, 202 S. C. 207, 24 S. E. (2d) 353. But here we think it clear that jurisdiction of the Commission does exist perforce the terms of Code Sec. 58-991, *i. e.*, "The * * * Commission shall regulate and control by special order in each case the manner in which any * * * railroad track may cross any railroad track * * *."

With Sec. 58-992, referring expressly to grade crossings ("at the same level"), already "on the books" for many years the General Assembly passed Sec. 58-991 in 1912, which was Act No. 451 of that year, entitled "An Act to Empower the Railroad Commission (now the Public Service Commission) to Regulate the Crossing of Any Street, Street Railway or Other Railway over Any Railroad Track." 27 Stat. 791.

The ordinary definition of the verb "cross" is to pass from side to side, as from one side of a street or river to the other. When applied to railroads and intended to refer to a crossing at grade it is usually so described,—“grade crossing”, or as in Sec. 58-992 a crossing “at the same level.” With the latter already within the jurisdiction of the Commission it must have been the intention of the legislature in the enactment of Sec. 58-991 to include within the jurisdiction of the Commission any sort of crossing of one railroad by another. Contrary conclusion, as contended for by respondent, would have grade crossings regulated and tun-

nels and overpasses (which doubtless demand it more) unregulated. Such an anomalous intent will not be attributed to the legislature in the absence of clear expression.

It was said in *Cleveland, C. C. & St. L. Ry. Co. v. Halbert*, 75 Ill. App. 592, that every intersection is a crossing but every crossing may not be an intersection, since one railroad may cross another over or under it but not on the same level and in such case there would be, strictly speaking, no intersection but it would be a crossing. In the old New York case of *People v. New York Cent. Ry. Co.*, 25 Barb. 199, it was held that a statute requiring locomotives to sound a bell or whistle 80 rods from the place where the railroad should cross any traveled road or street, it does not mean merely to cross at grade, but includes an overhead crossing.

We are of the opinion that before proceeding with its condemnation and construction respondent is required to apply to the South Carolina Public Service Commission and obtain its order governing the manner of the construction of its proposed tunnel under the tracks of appellants, which will be a crossing of them. Code Sec. 58-991.

Appellants raise other points which it is unnecessary to consider for the purpose of this decision, including the contention that the claimed failure and refusal of respondent to disclose fully its construction plans makes it impossible for appellants to determine and prove their damages in the condemnation proceeding. As pointed out in their brief, this problem (if of substance) will doubtless be solved in a proper proceeding before the Public Service Commission and its resultant order.

The order under appeal is reversed.

TAYLOR, OXNER, LEGGE and MOSS, JJ., concur.

17726

W. Lewis WALLACE, Ancillary Receiver for South Carolina for Keystone Mutual Casualty Company, of Pittsburgh, Pennsylvania, dissolved, Appellant, v. Eva McDonald TIMMONS, Individually and as Executrix of the Estate of William H. Timmons, Respondent.

(117 S. E. (2d) 567)

Action by ancillary receiver of insolvent foreign insurer brought against insurance agent's widow, individually and as his executrix, wherein an accounting of funds which had been collected in course of agency and which constituted trust fund was sought. Plaintiff moved for inspection of records revealing moneys collected from certain policyholders and any offsets to which defendant claimed to be entitled. The Common Pleas Court of Greenville County, G. Badger Baker, J., entered order denying the motion and plaintiff appealed. The Supreme Court, Legge, J., held that the motion should have been granted and that the order denying it would be reversed.

Reversed.

1. **DISCOVERY.**—Statute relating to pretrial examination of an adversary and statute relating to pretrial inspection of books, papers and documents have identical purpose of permitting litigant to gather evidence in advance and thus be enabled to present it at trial concisely, economically, and without undue waste of court's time and relief thereunder should be granted with liberality. Code 1952, §§ 26-502, 26-503.
2. **APPEAL AND ERROR—DISCOVERY.**—A motion under statute relating to pretrial examination of adversary or relating to inspection of books, papers and documents is addressed to discretion of trial judge and reviewing court may not substitute its judgment simply because it might have reached a different conclusion had it been in trial judge's place but reviewing court's function is limited to inquiry whether order resulted from error at law or, if based upon factual considerations, was without adequate evidentiary support. Code 1952, §§ 26-502, 26-503.
3. **DISCOVERY.**—In action by ancillary receiver of insurer, against insurance agent's widow who was his executrix, for accounting with respect to funds which were collected by agency within scope of agency agreement and which constituted trust fund, receiver's motion for order requiring defendant to produce for inspection books,

records and other papers of agency which would reveal moneys collected from certain policyholders and any offsets to which agency was claimed to be entitled as result of insolvency of insurer should have been granted and order denying motion would be reversed. Code 1952, §§ 19-474, 26-502, 26-503.

Messrs. Thomas A. Wofford and Charles B. Bowen, of Greenville, for Appellant, cite: As to error on part of trial Judge in refusing to require respondent to produce, for inspection, books, papers and records in her possession, or under her control, which contain evidence relative to the merits of this action: 122 S. C. 86, 114 S. E. 700; 224 S. C. 201, 78 S. E. (2d) 237; 14 Am. Jur., Discovery and Inspection, Sec. 40; 232 S. C. 311, 101 S. E. (2d) 844; 26 S. C. 538, 2 S. E. 568. As to the express terms of the agreement showing prima facie that a trust was created: 40 S. C. 393, 18 S. E. 929.

Messrs. Leatherwood, Walker, Todd & Mann, of Greenville, for Respondent, cite: As to facts stated in motion papers not being sufficient to warrant order directing respondent to produce books, papers and records: 224 S. C. 415, 79 S. E. (2d) 365; 180 S. C. 364, 185 S. E. 863; 40 S. C. 393, 18 S. E. 929; 107 S. C. 109, 91 S. E. 973. As to the appellant not carrying the burden resting upon him to prove prima facie the existence of the trust alleged in the complaint: 153 S. C. 56, 150 S. E. 347; 40 S. C. 393, 18 S. E. 929.

December 14, 1960.

LEGGE, Justice.

This is an appeal from a circuit court order denying the plaintiff's motion to require the defendant to produce for inspection on the part of the plaintiff certain books and records of the William R. Timmons Agency.

Appellant, as ancillary receiver of Keystone Mutual Casualty Company of Pittsburgh, Pennsylvania, brought this action in 1956 against the respondent individually and as executrix of the estate of her late husband, William R. Tim-

mons, for an accounting of moneys allegedly collected by him as agent of said company and in his possession at the time of his death in 1948. On a former appeal, from an order sustaining a demurrer to the complaint, we held, 232 S. C. 311, 101 S. E. (2d) 844:

1. That since the plaintiff had conceded that the claim against the defendant in her capacity as executrix was barred because not filed within the time prescribed by Section 19-474 of the 1952 Code, the only question presented by the appeal, in respect of that statute, was whether the claim against the defendant individually, as sole distributee of her husband's estate, was barred by it.

2. That Sections 19-473 and 19-474 relate to claims of creditors and debts of a decedent payable from his estate and are not applicable to a case such as this, where it is alleged and must be taken as true upon demurrer that the moneys collected by the decedent constituted a trust fund; for if the decedent held the fund in trust its character was not changed by his death and it did not become part of his estate or liable for his debts.

3. That whether or not a trust relationship as to these funds did in fact exist was a matter for determination upon the trial of the case on its merits.

4. That in view of the allegations of the complaint the question of laches should not have been passed upon by the circuit judge at that stage of the case, but should have been left for determination upon the trial of the case on its merits.

5. The order appealed from was reversed and the cause remanded with leave to the defendant, individually, to answer the complaint.

The allegations of the complaint as summarized in the report of the former appeal are repeated here for convenient reference:

"The complaint alleges that the plaintiff is the ancillary receiver in this state for the Keystone Mutual Casualty

Company, a Pennsylvania corporation now dissolved; on March 13, 1944, William R. Timmons, now deceased, and the Keystone Mutual Casualty Company entered into an agency agreement, a copy of the agreement is attached and made a part of the complaint; pursuant to the agreement William R. Timmons collected large sums of money for the Keystone company, and that under the terms of the agreement he became the trustee of such monies for the benefit of the company; Mr. Timmons died testate on June 22, 1948, leaving an estate valued at more than \$500,000.00, with his wife, the defendant Eva McDonald Timmons, as executrix and sole beneficiary; on July 25, 1948, Mrs. Timmons was appointed executrix of the estate; at the time of the death of Mr. Timmons he had in his possession \$25,504.72 belonging to the Keystone company; that this sum was impressed with a trust under the agency agreement; the decedent had on deposit in three banks the sum of \$61,638.34, in accounts denominated 'W. R. Timmons, Agency', with which accounts the sum held by him as trustee was commingled; and the three banks have turned over the deposits to the defendant as executrix.

"That on September 13, 1951, the plaintiff filed a claim against the decedent's estate in the amount of \$25,504.72; the claim was not filed within the time required by section 19-474 of the code, and a hearing on it was never had, and it was never honored or refused; the estate has never been settled; that the plaintiff is entitled to an accounting respecting the trust funds, and to have them held for disposal as he shall direct; and that to allow the defendant to keep the funds would be an unjust enrichment.

"One paragraph of the attached agreement is as follows: 'The agent agrees that all money or securities received or collected by him shall be held by him in trust for the benefit of the Company, and remitted to the Company in strict accordance with the rules and regulations of the Company and the terms of this agreement.'

"The prayer is for an accounting; that the defendant be required to pay over the trust funds to the plaintiff; and that the plaintiff have judgment against the defendant, individually and as executrix, in the amount of the trust funds."

Upon remand of the cause the defendant answered:

1. admitting that her late husband had on March 13, 1944 entered into the agency agreement referred to in the complaint and a copy of which was attached to the complaint as part of it, but denying that under the terms of said agreement he became or was constituted a trustee for Keystone;

2. admitting that Mr. Timmons died on June 22, 1948, leaving an estate valued at more than \$500,000.00, and that she is the executrix and sole beneficiary of his will and has never been discharged as such executrix, but alleging that the estate has been settled and that she has made application for discharge as executrix, notice thereof having been advertised on or about June 16, 1949;

3. admitting that plaintiff filed in the probate court his claim against the estate on or about September 13, 1951; but alleging that the claim is barred because not filed within the time prescribed by Section 19-474, is barred also by the general statutes (Section 10-141 *et seq.*) limiting the periods within which actions other than for the recovery of real property must be commenced, and is barred also by laches; and

4. denying all allegations not expressly admitted.

Appellant's motion, from denial of which comes the present appeal, was for an order "requiring the defendant to produce for inspection by plaintiff's attorneys and plaintiff's accountant such books, records and other papers of the William R. Timmons Agency as will reveal the following: (1) The moneys collected, if any, by William R. Timmons from the ninety-four (94) policy holders listed in Exhibit A which is attached hereto; (2) Any and all offsets said rec-

ords may reveal defendant is claiming or entitled to as a result of the insolvency of Keystone Mutual Casualty Company, dissolved on June 26, 1947."

In support of the motion there were presented certain affidavits and correspondence, in substance as follows:

1. Letter from Francis X. McClanaghan, Special Deputy Insurance Commissioner of the Commonwealth of Pennsylvania, addressed to Mr. Cox, of counsel for the plaintiff, under date October 15, 1958, advising that under the laws of Pennsylvania the Insurance Commissioner is designated as receiver of insolvent insurance companies to collect their assets and distribute them to claimants and creditors; that the records of Keystone Mutual Casualty Company in the possession of the Commissioner indicate that under ninety-four separate policies Keystone had insured certain individuals at the request of the Timmons Agency, which by the terms of its agency agreement with Keystone was a fiduciary or trustee of the latter; and that each such policy would have been cancelled sixty days after issuance if the insured had not paid his premium to the Timmons Agency; that from this the Commissioner has deduced that the Timmons Agency must have collected these premiums, or most of them, and owed Keystone the money involved in this action when Keystone was taken over by the Commissioner; in addition, that several of these insureds had advised the Commissioner that they had paid their premiums to the Timmons Agency; and that in these circumstances it would seem most pertinent to ascertain what the records of the Timmons Agency might disclose as to these ninety-four policies. In conclusion the Deputy Commissioner stated that if such records should clearly indicate that the Timmons Agency did not receive this money, his office would reexamine its position with regard to pressing its claim and might possibly authorize counsel to withdraw the action; and he requested that Mr. Cox make the necessary arrangements with counsel for the Timmons Agency for examination of these records, and if consent to do so could

not be obtained, that he seek an order of court for such examination.

2. Letter from Mr. Cox to Mr. Walker, of counsel for the defendant, dated October 31, 1958: referring to Mr. McClanaghan's letter before mentioned; enclosing a list of the ninety-four insureds and the numbers of their respective policies; referring to his understanding of an agreement between counsel for the parties whereby defendant's counsel would obtain from his client and transmit to plaintiff's counsel such information as the books of Timmons Agency might contain with regard to the said insureds and policy numbers; referring also to a conversation between Mr. Cox and Mr. Walker wherein the latter had mentioned the fact that after Keystone had gone into receivership Mr. Timmons had secured other insurance coverage for these policy holders, and Mr. Cox had expressed the view that in such case Mr. Walker's client would be entitled to an offset against plaintiff's claim; and requesting that Mr. Walker have his client furnish Mr. Cox as promptly as practicable the information contained in the books of Timmons Agency concerning the policies and policy holders before mentioned.

3. Letter from Mr. Walker to Mr. Cox advising that a check of the list of names and policy numbers enclosed with Mr. Cox's letter of October 31 had revealed that the list included some policies that had not been written under the agency agreement; returning the list, advising that "it does not provide us with any information with regard to the subject litigation;" and refusing Mr. Cox's request.

4. Affidavit of Francis X. McClanaghan, Deputy Insurance Commissioner, dated January 9, 1959, setting forth among other things the following:

(a) That on June 26, 1947, by decree of the Court of Common Pleas of Dauphin County, Pennsylvania, Keystone Mutual Casualty Company was ordered to be dissolved and the Insurance Commissioner of Pennsylvania was ordered to take possession of its records and other property for

the purpose of liquidating its affairs and making distribution to creditors.

(b) That prior to the receivership the company employed several hundred people and had compiled voluminous records all of which came into the possession of the Insurance Department for inspection and review; but that because of the company's financial difficulties, and in order to preserve its assets in the possession of the Insurance Commissioner, it became necessary to discharge many of the company's employees and many others quit of their own accord, leaving only a skeleton force to carry on the necessary work.

(c) That the late William R. Timmons was an agent of Keystone in Greenville, S. C., at the time of the receivership; and that up to the time of his death on June 22, 1948, he had failed, according to affiant's information and belief, to submit an accounting of moneys collected and held in trust by him as agent of said dissolved company; and that since his death the representative of his estate has also failed to submit such accounting although frequently requested to do so.

(d) That according to available records and information in the possession of the receiver, Mr. Timmons was indebted to Keystone at the time of his death in the sum of \$15,-881.70.

In opposition to the motion the defendant contended:

1. That from the documents presented with her return (and to which we shall later refer) it is obvious that the plaintiff has available to him sufficient records and other information to prove that his claim as set forth in the complaint is without merit;

2. That defendant's showing in support of the motion was insufficient to enable the court to determine whether the documents sought to be produced contain evidence as to policies involved under the agency agreement; and further, that records pertaining to offsets in favor of the defendant would concern the defense, and production of them under the discovery statute is prohibited.

3. That the motion seeks compulsory disclosure of information from records and files of business entities that are separate and distinct from the defendant and over which she has no authority or control, "and only a small portion of the ninety-four insurance policies contained in the list attached to the present motion are involved under the agency agreement on which this action is based."

The documents submitted by the defendant with her return are the following:

1. Letter dated December 13, 1955, from Emmanuel Weinberg, Special Deputy Insurance Commissioner of Pennsylvania, by Jack Litz, to Thomas A. Wofford, of counsel for the plaintiff, stating: that among the assets of Keystone taken over by the statutory liquidator were two accounts of William R. Timmons Agency, *viz.*: a direct agent's account, to which the agency agreement was applicable, showing an unpaid balance due Keystone as of June 26, 1947, in the amount of \$21,898.23; and an account of William R. Timmons Agency as sub-agent of Baylor's Insurance Service, a general agency for Keystone, on which account the unpaid balance as of June 26, 1947, was \$3,506.49; that these two accounts among the records of Keystone total \$25,404.72; that the Commissioner's office file does not contain an affidavit, previously mentioned by Mr. Wofford, stating that the Commissioner's claim against Mr. Timmons' estate was in the amount of \$25,504.72; that it is Mr. Weinberg's thought that this affidavit may have been sent to Mr. Wofford by the ancillary receiver in South Carolina; that the difference of \$100.00 between the amount mentioned in the affidavit and the total of the two agency accounts before mentioned is found in the Columbia Company file, relative to Policy No. 3843, and the Columbia Company's account would appear to be entitled to a cancellation credit of \$100.00; that he is enclosing itemized statements of the two accounts of the Timmons Agency before mentioned, but "we are unable to give you a definite statement of what portion of the total of the two accounts open

as of the dissolution of Keystone would be due from the estate of William R. Timmons, as this requires an audit of the records of the Agency and no audit was made by the statutory liquidator subsequent to dissolution."

2. Letter dated February 7, 1956, from Mr. Wofford to Mr. William M. Brice, Jr., Attorney, of York, S. C., advising that a hearing in the matter has been set by the Probate Court for February 18, 1956, subject to reasonable postponement if necessary so that Senator Wallace may be available as a witness; requesting that Mr. Brice contact the Senator and advise Mr. Wofford; and stating that in the meantime he would arrange with the Pennsylvania Insurance Department to make available a witness having knowledge of the condition of Keystone's records in the possession of that department.

3. Letter dated February 7, 1956 from Mr. Cox to Mr. Litz advising of the postponement of the February 18 hearing so that a witness might be available from the Commissioner's office to testify to the condition of the account between Keystone and Timmons at the time of the latter's death; and requesting information on the condition of the dissolved corporation with respect to the William R. Timmons Agency as of the date of Mr. Timmons' death.

4. Letter dated February 7, 1956 from Mr. Cox to the Probate Judge of Greenville County, advising that as soon as he can ascertain from the Insurance Department of Pennsylvania when a witness will be available to testify as to Mr. Timmons' indebtedness to Keystone as shown by Keystone's books, he will notify the Probate Judge so that a hearing might be set at which that witness and Senator Wallace could be present.

5. Affidavit of Gordon K. Rodgers, dated March 11, 1959, stating: that he has been in the employ of William R. Timmons Agency for approximately fourteen years, is familiar with the records of said agency, and has made a study of them at the request of counsel for Mrs. Timmons; and that he "has examined the list of ninety-four

(94) insurance policies which plaintiff would claim to be involved in the present matter and deponent says that only a small portion of the ninety-four (94) insurance policies contained in the list attached to the present motion are involved under the Agency Agreement that is attached to and made a part of the complaint."

Section 26-503 of the 1952 Code, relating to pre-trial examination of an adversary party, has for its aim the promotion of efficient administration of justice by permitting a litigant to gather his evidence in advance and thus be enabled to present it at the trial concisely, economically, and without undue waste of the court's time. *Barfield v. Dillon Motor Sales, Inc.*, 233 S. C. 26, 103 S. E. (2d) 416. Section 26-502, under which plaintiff's motion in the case at bar was laid, is concerned with pre-trial inspection of books, papers and documents, in the possession or under the control of the adversary party, containing evidence relating to the merits of the movant's case. Its purpose is identical with that of Section 26-503, and relief under it, as under 26-503, should be granted with liberality.

By judicial interpretation of Section 26-503, *Stepp v. Horton*, 227 S. C. 432, 88 S. E. (2d) 258, *Peagler v. Atlantic Coast Line R. Co.*, 232 S. C. 274, 101 S. E. (2d) 821, and by the express language of Section 26-502, a motion under either is addressed to the discretion of the circuit judge. Accordingly, in the instant case, we may not substitute our judgment for his simply because we might have reached a different conclusion had we been in his place; and our function is limited to inquiry whether the order under appeal resulted from error of law or, if based upon factual considerations, was without adequate evidentiary support. *Simon v. Flowers*, 231 S. C. 545, 99 S. E. (2d) 391. That order, after recital of the history of the case, proceeds as follows:

"The complaint, motion and argument of plaintiff are predicated on the theory of the existence of a trust. Under

the argument of plaintiff's counsel, he would not be entitled to this discovery by this extraordinary process unless and until he has proved *prima facie* the existence of the trust alleged in the complaint. The defendant, by her answer, expressly denies the existence of any such trust and I do not find that in the circumstances of this case this individual defendant should be required to produce books, records and papers for examination by the plaintiff pursuant to the motion before me."

To be entitled to an order for discovery under Section 26-502 a plaintiff must show, *prima facie*, that he has a cause of action and that the books, papers and records that he seeks to examine contain evidence relating to the merits of his case and are in the possession or under the control of his adversary. We have held that such proof may be made by verified complaint, with or without additional affidavits. *United States Tire Co. v. Keystone Tire Sales Co.*, 153 S. C. 56, 150 S. E. 347, 66 A. L. R. 1264. In the case at bar the record does not disclose whether or not the complaint was verified; but that is immaterial in view of the supporting affidavits before summarized. That moneys collected by the Timmons Agency within the scope of its agency agreement with Keystone would constitute a trust fund is implicit in the decision on the former appeal, where it was held that the allegations of the complaint with reference to such collections were sufficient to withstand a demurrer based upon Section 19-474 of the Code. Plaintiff's showing in this regard, as well as to the effect that the records that he seeks to examine are pertinent to the merits of his case, is amplified by the affidavits tendered in support of his motion. We think that the *prima facie* showing thus made clearly entitled him to the order for discovery, and that the circuit court was in error in holding otherwise.

That the Commissioner's affidavit of January 9, 1959, states Mr. Timmons' indebtedness to Keystone at the time of his death as \$15,881.70 instead of \$25,504.79, the amount stated in the claim as filed in the probate court in 1951 and

as stated in the complaint in 1956, is not material to the issue now involved. The discrepancy between the two figures rather emphasizes the plaintiff's inability to determine the exact amount of the indebtedness from the records of Keystone alone. Nor is it of any consequence that the records of the Timmons Agency may reveal that as the result of his procurement of other insurance for policy holders of Keystone following its receivership Mr. Timmons would have been entitled to an offset against the receiver's claim, as suggested in Mr. Cox's letter to Mr. Walker of October 31, 1958. Respondent argues that in such event the granting of the present motion would result in discovery of matter of defense rather than of matter pertinent to the plaintiff's case; but there is no merit in that position, because respondent has not pleaded offset.

Appellant's showing on the motion was aided, rather than weakened, by the documents offered by respondent in opposition to it. Particularly is this true in regard to the affidavit of Mr. Rodgers, presented by respondent from which it is apparent that the Timmons Agency is still in operation, and that the affiant, who has been in its employ for many years, has concluded, after a study of its records, that only a "small portion" of the ninety-four insurance policies on which appellant's claim is based are "involved under the agency agreement." In the order under appeal the circuit judge states: "It can be added that plaintiff has not made a sufficient showing that the books, records and papers demanded to be produced are in existence and, further, there is no showing whatsoever that the individual defendant, Eva McDonald Timmons, has any such records, documents and papers in her custody and possession." In the light of the Rodgers affidavit, we think that this portion of the order lacks adequate evidentiary support. It is apparent that the records sought to be inspected do exist and are available to the respondent. The statute does not require that they be in her actual custody and possession.

The aim of modern practice and procedure is to concisely frame the issues between the parties and promptly and

clearly present them for judicial determination. Hide-and-seek is not a game for the courts; discovery under Sections 26-502 and 26-503 is no longer to be regarded as an extraordinary process. That the complaint here states a cause of action has already been adjudicated. The case should now proceed to trial on the merits.

Appellant's motion should have been granted. The order appealed from is accordingly reversed.

STUKES, C. J., and TAYLOR and OXNER, JJ., concur.

Moss, J., did not participate.

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Dorothy R. GREEN, Respondent, v. Charles E. GREEN, Appellant
(117 S. E. (2d) 588)

Divorced wife brought suit against divorced husband to establish resulting trust with respect to house and lot, title to which had been taken solely in name of divorced husband. The County Court of Greenville County, W. B. McGowan, J., rendered judgment in favor of the divorced wife, and the divorced husband appealed. The Supreme Court, Moss, J., held that evidence was sufficiently clear, definite, unequivocal, satisfactory, and convincing to support finding that there was a resulting trust in favor of the divorced wife.

Judgment affirmed.

1. TRUSTS.—Generally, when realty is conveyed to one person and consideration is paid by another, it is presumed that party paying purchase money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf.
2. HUSBAND AND WIFE—TRUSTS.—Where husband pays purchase money for realty, and conveyance is taken by wife, for whom husband is under legal obligation to provide, no presumption of resulting trust in favor of husband attaches, and, on the contrary, presumption is that purchase was designed as a gift or advancement to wife, but such presumption is one of fact and not of law and may be rebutted by parol evidence or circumstances showing a contrary intention.

3. **HUSBAND AND WIFE.**—Where husband purchased original house and lot and directed that title be placed in joint names of husband and wife, even though husband paid purchase price thereof, that part of purchase price contributed by husband was presumed to be a gift to the wife, and, in absence of evidence to rebut such presumption, conclusion was inevitable that wife had an undivided one-half interest in the house and lot, and when house and lot were sold, she was entitled to half of proceeds thereof.
4. **TRUSTS.**—Evidence to establish a resulting trust must be clear, definite, and convincing.
5. **TRUSTS.**—Evidence was sufficiently clear, definite, unequivocal, satisfactory, and convincing to support finding of trial judge that there was a resulting trust in favor of wife for an undivided one-half interest in original house and lot for which husband paid purchase price, and that proceeds from sale of original house and lot went into construction of new house on lot purchased by husband.
6. **TRUSTS.**—In suit by divorced wife against divorced husband to establish a resulting trust in favor of divorced wife with respect to house and lot, testimony of divorced wife with respect to oral agreement that title to house and lot would be placed in joint names of husband and wife was properly admitted over objection of divorced husband that any such agreement was required to be in writing, where testimony showed full performance of the oral agreement so as to take it out of the statute of frauds. Code 1952, § 67-1.
7. **TRUSTS.**—In order for resulting trust to arise with respect to realty, it must arise at time purchase is made, and funds must be then advanced and invested, and it cannot arise as result of later advances or funds subsequently furnished.
8. **TRUSTS.**—In suit by divorced wife against divorced husband to establish resulting trust with respect to house and lot, evidence sustained finding that wife made contribution for purchase price of house and lot prior to the purchase thereof.
9. **HUSBAND AND WIFE.**—A gift of funds from wife to husband may be inferred from circumstances, and marriage relationship is a factor of importance to be considered.
10. **HUSBAND AND WIFE.**—In action by divorced wife against divorced husband to establish resulting trust with respect to house and lot, wherein divorced husband contended that money contributed by divorced wife to him during the marriage for purchase of house and lot was a gift, testimony of divorced wife completely negated any gift and rebutted any presumption of such.
11. **APPEAL AND ERROR.**—Where Supreme Court on appeal did not find from record that trial judge passed on issue raised by exception of appellant, such issue was not properly before Supreme Court for decision.

Messrs. Leatherwood, Walker, Todd & Mann, of Greenville, for Appellant, cite: As to the evidence in this case not being competent, clear, definite, unequivocal, satisfactory and convincing as is required to establish a resulting trust: 56 S. C. 78, 34 S. E. 22; 80 S. C. 30, 61 S. E. 200; 200 S. C. 279, 20 S. E. (2d) 741. As to rule that for a resulting trust to arise the trust must be co-equal with the deed, and cannot arise from subsequent transactions: 23 S. C. 251; 90 S. C. 522, 73 S. E. 1029; 187 S. C. 36, 196 S. E. 369; 78 S. C. 490, 59 S. E. 535; 52 S. C. 472, 30 S. E. 602. As to the circumstances in this case tending to show a gift rather than a resulting trust: 118 S. C. 342, 110 S. E. 798; 215 S. C. 514, 56 S. E. (2d) 336. As to respondent being guilty of such acquiescence and delay as to bar her from asserting any claim to the property involved: 118 S. C. 342, 110 S. E. 798; 6 S. E. 216; 118 S. C. 342, 110 S. E. 798.

Messrs. Price & Poag, of Greenville, for Respondent, cite: As to the trial Judge properly awarding to the respondent, as a resulting trust, all of her contributions invested by the plaintiff in the purchase of a lot and the construction of a house thereon: 78 S. C. 490, 59 S. E. 533; 23 S. C. 251; 90 S. C. 522, 73 S. E. 1029; 54 Am. Jur., Trusts, Sec. 216; 187 S. C. 36, 196 S. E. 369; 3 Pom. Eq. Jur., Sec. 1037; 215 S. C. 514, 56 S. E. (2d) 336.

December 15, 1960.

Moss, Justice.

Charles E. Green, the appellant herein, and Dorothy R. Green, the respondent herein, were married in 1937, and divorced in 1958. It appears from the undisputed evidence in this case that on February 20, 1943, the appellant purchased a house and lot on Carroll Lane in Greenville, South Carolina, and title thereto was taken in the names of both the husband, Charles E. Green, and his wife, Dorothy R. Green, as tenants in common. The purchase price of the house and lot was \$5,750.00. A mortgage for \$4,700.00 upon the house and lot was executed by the parties to First Federal Savings

and Loan Association, and the sum obtained applied upon the purchase price. A second mortgage was executed by the parties to the seller of said house and lot for the sum of \$350.00. These mortgages were to be paid in monthly installments, and the appellant made all of such payments. It is an admitted fact in the record that the respondent furnished no part of the purchase price nor did she furnish the money for or make any of the installment payments. It appears that there were born of the marriage three children and in 1950 it became evident that the home located on the above described property was inadequate in size, the same being a two bedroom dwelling, for the family of the parties. It was decided to acquire a different lot and to build a larger and more adequate dwelling, consonant with the needs of the Green family. In order to pay the purchase price of the new lot, the parties remortgaged the original lot to First Federal Savings and Loan Association, thereby refinancing the existing mortgage upon such premises and also obtaining \$2,854.28, which was used in the payment of a part of the purchase price of the new lot. The new lot, also located on Carroll Lane, was purchased on September 18, 1950, for the sum of \$3,000.00 and title thereto was taken solely in the name of Charles E. Green. The deed to the new lot was promptly recorded in the Register of Mesne Conveyances office in Greenville County, South Carolina. This original deed was brought to the home of the parties and placed in a box in which various papers of the parties were kept.

It further appears that on January 19, 1951, which was about four months after the purchase of the new lot, and the taking of the deed thereto in the appellant's name alone, that the original house and lot were sold by the parties. The net proceeds of this sale were \$4,921.16 and these funds were deposited in the joint bank account of the parties.

Some months later the construction of a dwelling on the new lot was commenced, and on May 28, 1951, a construction loan in the sum of \$8,500.00 was obtained, and the respondent renounced dower upon the mortgage securing such.

On September 26, 1951, a permanent loan of \$16,000.00 was secured from C. Douglas Wilson & Company, the principal of this loan was payable in monthly installments. The respondent duly renounced dower on this mortgage. It appears that the appellant either made or furnished the money for the payment of all the monthly installments on this mortgage.

The respondent, in her complaint, asserts that by virtue of the fact that the funds derived from the mortgaging of the home jointly owned by her and the appellant, and the funds derived from the sale of the home jointly owned by the parties, went into the purchase price of the lot and the cost of the construction of the home erected thereon, entitled her to either a joint interest in the new house and lot or entitled her to a judgment for her monetary contribution thereto, and also that the Court should decree a resulting trust in her favor. The respondent demanded that the Court order the appellant to pay to her the amount of her monetary contribution out of the proceeds of any sale of the new house and lot.

The appellant duly filed an answer to the complaint asserting that there was no resulting trust in favor of the respondent and alleging, on the contrary, that he was the sole owner of the new house and lot and that he alone held title thereto for eight years and made all the monthly installment payments due on a mortgage thereon. He further contended that, if the respondent were entitled to any sum, it would be limited to only one-half of the proceeds of the funds obtained by the refinancing mortgage on the original lot, which said sum went to purchase the new lot. The appellant contended that in order for a resulting trust to arise, that it must arise because of a contribution of money made by the respondent at the time of the purchase of the new lot and not at any subsequent time.

By an agreement of the parties, this case was heard by the Honorable W. B. McGowan, Judge of the Greenville County Court. At the trial of the case testimony was taken and

various exhibits offered in evidence. Thereafter, on October 6, 1959, the trial Judge filed his Order holding that the respondent had, by way of resulting trust, an interest in the new property to the extent of \$3,887.72. He further held that the proceeds derived from the refinancing mortgage on the original lot went into the purchase price of the new lot and that the net proceeds of the sale of the original house and lot went into the construction of the new home on the new lot, and that this was done pursuant to an agreement between the parties.

During the pendency of this cause, the new house and lot were sold for a total sum of \$25,000.00, and under an appropriate order of the Court, one-half of the net proceeds of the sale, or \$5,671.43, was deposited with the Clerk of the Court awaiting the further order of the Court. The trial Judge directed the Clerk of the Court to disburse the \$5,671.43 so deposited by paying to the respondent \$3,887.72, and that the remainder, in the amount of \$1,783.71, be paid to the appellant.

Timely notice of intention to appeal was given by the appellant from the Order of the trial Judge.

It is well to determine how the trial Judge arrived at the amount which he awarded to the respondent. It is an admitted fact that by the refinancing mortgage given to the First Federal Savings and Loan Association by the parties, that they obtained \$2,854.28, and of the sum so obtained \$1,427.14 belonged to the respondent, and this was invested in the purchase of the new lot. The net proceeds from the sale of the old house and lot were \$4,921.16, of which \$2,460.58 was the property of the respondent. This sum was invested in the construction of the new house on the lot, title to which was in the name of the appellant. The sum of the two items, to which the respondent was entitled, amounts to \$3,887.72. It was a question of fact for the trial Judge to determine as to whether this total sum went into the purchase of the new lot and the construction of the new house thereon. He has

determined this fact in favor of the respondent and there is evidence to support such finding.

The general rule is that when real estate is conveyed 1, 3 to one person and the consideration paid by another, it is presumed that the party who pays the purchase money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf. But, when the conveyance is taken to a wife, for whom the purchaser is under legal obligation to provide, no such presumption attaches. On the contrary, the presumption in such case is that the purchase was designed as a gift or advancement to the person to whom the conveyance is made. This presumption, however, is one of fact and not of law and may be rebutted by parol evidence or circumstances showing a contrary intention. *Caulk v. Caulk*, 211 S. C. 57, 43 S. E. (2d) 600; *Legendre et al. v. South Carolina Tax Commission*, 215 S. C. 514, 56 S. E. (2d) 336; *Bates v. Bates et al.*, 213 S. C. 26, 48 S. E. (2d) 612. In this case the appellant directed that title to the original house and lot be placed in the joint names of the parties, even though the appellant paid the purchase price thereof. In these circumstances the law is settled that the part of the purchase price contributed by the appellant is presumed to be a gift to the respondent, and there is nothing in the evidence in this case to rebut the presumption. Hence, the conclusion is inevitable that the respondent had an undivided one-half interest in the original house and lot and when mortgaged or sold she was entitled to one-half of the proceeds thereof.

In the case of *Privette v. Garrison et al.*, 235 S. C. 4 119, 110 S. E. (2d) 17, 21; this Court said:

"While a resulting trust may be proven by parol, the evidence to establish it must be clear, definite and convincing. *Rogers v. Rogers*, 52 S. C. 388, 29 S. E. 812. And where the claim to such a trust is based upon payment of the purchase money or some definite portion of it by the beneficiary, such payment must be clearly and unmistakably

shown to have been so made at or before the time of the purchase. *Hutto v. Hutto*, 187 S. C. 36, 196 S. E. 369. * * *."

It is the position of the appellant that the trial Judge
5 was in error in finding that there was a resulting trust in favor of the respondent. He submits that there is no competent, clear, definite, unequivocal, satisfactory and convincing evidence to support such finding. We are convinced from a reading of the record that there is clear, definite, and convincing evidence to establish that the sum of \$2,854.28, which said sum was obtained by a refinancing mortgage on the original house and lot, one-half of said sum being owned by the respondent, was used to purchase the new lot. The evidence shows that this sum was placed in a joint bank account of the parties and four days later the appellant purchased the new lot and the proceeds of the refinancing were used to purchase such lot. The appellant admitted in his testimony that in order to get the \$3,000.00 to pay for the new lot that he went to the bank and got the cash or wrote a check on the joint account of the parties. In the agreed statement contained in the transcript of record, it is admitted that "The parties decided to build a larger and more adequate house and, with that in mind, refinanced Lot 4 at First Federal on September 14, 1950, obtaining a mortgage loan in the amount of \$6,200.00, the net proceeds of which were \$2,854.28. * * * Four days later on September 18, Lot No. 6 was purchased from Mrs. Helen B. McDaniel and her two daughters for \$3,000.00. It is not disputed that the proceeds of the mortgage of four days before furnished part of this purchase price." In the Brief of the appellant, we find this admission: "The net proceeds of this loan were \$2,854.28, which was placed in the parties' joint bank account, and undoubtedly such proceeds were used to defray a part of the purchase price of Lot No. 6." The respondent testified that the \$2,854.28 went into the purchase of the new lot.

There is also clear, definite and convincing proof that when the old house and lot were sold, that the net proceeds of

\$4,921.16 also were used in the construction of the new house on the lot purchased by the appellant, title to which was taken in his own name. We quote from the testimony:

"Q. Did you and your husband reach an agreement as to acquiring a new home? A. Yes.

"Q. What was the agreement you reached? A. The only way we could acquire a new home was to sell the present home and take the money we got out of that house and put it into another house.

"Q. Did you reach an agreement that that was what you would do? A. Yes, sir.

"Q. Did you have any agreement with him as to what the ownership of the new home would be?"

* * *

"A. Well, it would be owned the same manner, jointly, as the other was.

"Q. Both of you agreed to that? A. Yes, sir.

"Q. Subsequent to that time did you put another mortgage on your home, the one you owned at that time? A. Yes, sir.

"Q. Where did you obtain that mortgage from? A. Fidelity Federal.

"Q. What became of the money he received from the note and mortgage to them? A. Well, we purchased the lot that we built our house on with part of it, and with the three thousand dollars that remained it was taken to pay off the mortgage we had on the house where we were living.

"Q. And three thousand dollars of that money went to purchase the new lot? A. Yes, sir.

"Q. How long did you continue living in that same house after you obtained that mortgage? A. Oh, I would say just a few months actually after we bought the lot; around five months I would say.

"Q. Had you listed the house for sale at that time after you obtained the mortgage did you list the house for sale? A. Yes.

"Q. At that time you had already obtained the new lot?
A. Yes, sir.

"Q. Did you sell that house? A. Yes, sir.

"Q. Do you recall who you sold it to? A. Yes, sir; W. Lindsey Smith and his wife.

"Q. What happened to the proceeds that you obtained from the sale of that house to Mr. and Mrs. Smith? A. Well, it was put in the new house that was to be built.

"Q. Any part of it used for any other purposes? A. No, sir.

"Q. Do you recall how the other mortgage was paid off? A. Well, when the house was sold the mortgage we had on that house was paid off by the proceeds from the selling of the house.

"Q. After you did that, how much balance did you have left? A. I would say a little over five thousand dollars.

"Q. What was done with that money? A. Of course, it all went into the new house; but as far as I remember it was the way we built our new house with cost plus, and there had to be a certain sum set aside to draw from before anything—"

The appellant admitted that a part of the funds obtained by the refinancing mortgage went into the purchase of the new lot. He also testified that when the original house and lot were sold that "not all of it" went into the construction of the new home.

The daughter of the respondent testified that she heard the discussion between her father and mother that the family was outgrowing the old house and they would have to build a new one. She further testified that they agreed that they would just sell the old home and take the money from that and build the new home, such to be owned jointly. The appellant testified that he had no agreement with the respondent that the title to the new lot would be placed in their joint names.

There is, in our opinion, clear, definite and convincing proof that the proceeds from the sale of the old house and lot owned jointly by the parties went into the construction of the dwelling on the new lot. The appellant himself admits that a part of the funds were so used, even though he denies that all of such funds were applied to this purpose. Since the conclusion is inevitable that the respondent not only furnished funds for the purchase of the lot in question, but also for the construction of the dwelling thereon, it was a question of fact for the trial Judge to determine the amount of funds so contributed. Upon this issue he has made a finding of fact, and there is evidence in the record to support such.

When the respondent was testifying to the oral agreement with her husband with reference to the ownership of the new home, the appellant objected to this testimony on the ground that any such agreement would have to be in writing, as is provided in Section 67-1 of the 1952 Code of Laws of South Carolina. We think that under the authority of *Brown v. Cave*, 23 S. C. 251, that the evidence as to the agreement was properly admitted and considered by the trial Judge, for the reason that the testimony showed full performance of the contract on the part of the respondent, which would take the case out of the Statute of Frauds. In the cited case, it is said:

“But if there should be any serious difficulty as to the proof to raise a resulting trust, it would seem that there can be no doubt that there was ample proof to take the case out of the statute of frauds by part performance. ‘It is well settled that the Court of Equity will enforce specific performance of a contract within the statute when the parol agreement has been partly carried into execution. The distinct ground upon which Courts of Equity interfere in cases of this sort is that otherwise one party would be able to practice a fraud upon the other.’ 2 Story Eq., para. 759; *Mims v. Chandler*, *supra* [21 S. C. 480]. We think the possession of the parties of their respective shares with the knowledge and consent of Boston, the improvement and cultivation of the same without

notice or warning, considered in connection with all the circumstances, and especially the payment of the purchase money, were sufficient evidence of part performance to take the case out of the statute. The agreement alleged by the respondents was proved. * * *

The appellant asserts that the trial Judge committed error in holding that there was a resulting trust in favor of the respondent as to the funds contributed by her for the construction of the dwelling on the new lot. He asserts that where a claim to a trust is based upon the payment of the purchase money, or some definite portion thereof, such payment must be shown to have been so made at or before the time of the purchase. Attention is directed to the fact that the deed conveying title to the new lot was dated September 18, 1950, and that the old house was not sold until January 19, 1951, nearly four months later, that the proceeds derived from such sale could not have been paid at or before the time of the purchase of the new lot by the appellant.

It has been held by this Court that in order for a
7 resulting trust to arise, that such must arise, if at all, at the time the purchase is made. The funds must then be advanced and invested. It cannot be made by after advances, or funds subsequently furnished. In the case of *Surasky v. Weintraub*, 90 S. C. 522, 73 S. E. 1029, it was held that the trust must be coequal with the deed, and cannot arise from any subsequent transactions. It was further held that in determining whether there was a resulting trust, we must look to the status of the parties at the time the deed was executed. In the case of *Hutto v. Hutto*, 187 S. C. 36, 196 S. E. 369, 370 it was held that in order to establish a resulting trust in lands conveyed to a grantee, it is necessary and indispensable that an actual payment of the purchase money, or some definite portion of it, should be clearly proved to have been made by the *cestui que* trust, at the time of the purchase. However, in this case, the Court quoted with approval from 3 Pomeroy's Equity Jurisprudence, at paragraph 1037, that in order for a resulting trust to arise,

"it is absolutely indispensable that the payment should be actually made by the beneficiary, or that an absolute obligation to pay should be incurred by him as a part of the original transaction to purchase, at or before the time of the conveyance; no subsequent and entirely independent conduct, intervention, or payment on his part would raise any resulting trust."

In Scott On Trusts, Vol. 3, Section 457, page 2300, it is said:

"In order to raise a resulting trust it is necessary that a person other than the grantee prior to or at the time of the purchase should pay or assume an obligation to pay the purchase price. It is not enough that subsequent to the purchase he pays or agrees to pay the purchase price."

In 54 Am. Jur., Trusts, Section 204, at page 159, it is said:

"A resulting trust arises, if at all, in the same transaction in which the legal title passes, at the time that legal title passes, on consideration advanced before or at that time, and not from matters thereafter occurring or on consideration thereafter advanced unless occurring or advanced immediately thereafter so as to be in fact part of the same transaction. The fundamental reason for the rule is that the resulting trust is one implied by law from the circumstances of consideration at the time of the transaction. * * *"

In the North Carolina case of *Waddell v. Carson*, 245 N. C. 669, 97 S. E. (2d) 222, 226, it is said:

"The general rule, which is supported by the overwhelming weight of authority, is, that in the absence of circumstances indicating a contrary intention, where on the purchase of property, the conveyance of the legal title is taken in the name of one person, for whom the purchaser is under no legal obligation to provide, and the purchaser has paid part of the purchase price and has incurred an absolute obligation to pay the remainder as a part of the original transaction of purchase at or before the time of conveyance, a re-

sulting trust arises by operation of law in favor of the person furnishing all the consideration, and the person thus obtaining the title is a trustee for his benefit. * * *

In the case of *Loggins v. Daves*, 201 Ga. 628, 40 S. E. (2d) 520, it was held that where initial payment was made at time deed was passed to another by person claiming benefit of implied resulting trust, pursuant to intent that person claiming the trust should pay the purchase price, initial payment would support establishment of trust, and subsequent payments, made in accordance with original intention, would establish that portion of the claim.

The trial Judge found as a fact that the respondent
8 contributed the sum of \$1,427.14 to the purchase price of the new lot and such contribution took place prior to the purchase of said lot. He also held that at the time of the purchase of the property, the respondent had absolutely obligated herself to contribute all of her interest in the proceeds from the sale of the old house and lot to the purchase of the new lot and the construction of a dwelling thereon. We think, under the authorities above cited, that he was correct in this legal conclusion. The respondent had paid part of the purchase price and had incurred absolute obligation to pay the remainder, when the old house and lot were sold, as a part of the original transaction and agreement, and such agreement having been made before the time of the conveyance of the property in question to the appellant, a resulting trust arose in favor of the respondent. It has been held that where part of the price of land was paid by one person and the title taken in the name of another, a trust resulted in favor of the former only to the extent of the payment. *McGee v. Edwards*, 52 S. C. 472, 30 S. E. 602. In this case, the trial Judge allowed the respondent a resulting trust only to the extent of her contribution to the purchase of the lot and the construction of a dwelling thereon. We think this holding was correct.

The appellant charges that the trial Judge erred in
9 not holding that the respondent had made a gift to
him of any funds which might have belonged to her
that went into the purchase of the new lot and the construction of a dwelling thereon. It is true that a gift from a wife to a husband may be inferred from the circumstances and the marriage relationship is a factor of importance to be considered. *Legendre et al. v. South Carolina Tax Commission, supra*. However, in the instant case, the appellant never testified that there was a gift to him by his wife. On the contrary, the wife specifically testified that there was no gift by her to the appellant. We quote from the record:

"Q. I will ask, did you make any of the money to him as a gift? A. No.

"Q. Did you intend for any of this money to go to him as a gift? A. No."

This testimony completely negates any gift and rebuts
10 any presumption of such. This exception is overruled.

The appellant asserts that the trial Judge committed error in not holding that the respondent has been guilty of improper acquiescence and delay. He says that the only reasonable inference to be given to the evidence in this case is that the respondent knew and acquiesced in the taking of title to the lot in question in his own name and that such acquiescence and delay bars her from any recovery.

We do not find from the record that the trial Judge
11 passed upon the issue raised by this exception. Therefore, it is not properly before us for decision. *Simonds v. Simonds*, 229 S. C. 376, 93 S. E. (2d) 107.

All of the exceptions of the appellant are overruled and the judgment below is affirmed.

Affirmed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, JJ.,
concur.

17728

Annie Lee Wells CORLEY and Richard Kendrick Corley, Respondents,
v. SOUTH CAROLINA TAX COMMISSION and State Work-
men's Compensation Fund, Appellants.

(117 S. E. (2d) 577)

Proceeding was brought to recover compensation for death of field agent of Sales Tax Division of the Tax Commission, who was killed in automobile accident while returning home from football game at city 75 miles from his home, on ground that primary purpose of the trip had been a business one. The Industrial Commission made an award in favor of the claimants. The Common Pleas Court of Greenwood County, John Grimbball, J., rendered a judgment affirming the award, and the South Carolina Tax Commission, employer, and the State Workmen's Compensation Fund appealed. The Supreme Court, Oxner, J., held that evidence did not sustain finding of Industrial Commission that primary purpose of the trip had been a business one.

Judgment reversed and case remanded to Common Pleas Court for purpose of vacating award and dismissing claim for compensation.

1. **WORKMEN'S COMPENSATION.**—It is the exclusive function of the Industrial Commission to settle questions of fact in workmen's compensation proceeding.
2. **WORKMEN'S COMPENSATION.**—On appeal by employer and State Workmen's Compensation Fund to Supreme Court from judgment of Circuit Court affirming compensation award of the Industrial Commission in compensation proceeding, limit of inquiry, which Supreme Court was permitted to make, was whether there was any evidence reasonably tending to support conclusions of Industrial Commission.
3. **WORKMEN'S COMPENSATION.**—Injury of employee during trip, which served both a business and a personal purpose, is "in course of employment," and "dual purpose trip doctrine" is applicable, if trip involves performance for employer of service, which would have caused trip to be taken by someone even if it had not coincided with personal journey.

See publication Words and Phrases, for other judicial constructions and definitions of "Dual Purpose Trip Doctrine" and "In Course of Employment."

4. **WORKMEN'S COMPENSATION.**—In proceeding to recover compensation for death of field agent of Sales Tax Division of Tax Commission, who was killed in automobile accident while returning home from football game at city 75 miles from his home, on ground that primary purpose of trip had been a business one, burden was on claimants to prove that field agent's work had at least a part in creating necessity for trip.
5. **WORKMEN'S COMPENSATION.**—In proceeding to recover compensation for death of field agent of Sales Tax Division of Tax Commission, who was killed in automobile accident while returning home from football game at city 75 miles from his home, on ground that primary purpose of trip had been a business one, circumstantial evidence could be used by claimants to prove that work of field agent had at least a part in creating the necessity for the trip.
6. **WORKMEN'S COMPENSATION.**—In proceeding to recover compensation for death of field agent of Sales Tax Division of Tax Commission, who was killed in automobile accident while returning home from football game at city 75 miles from his home, on ground that primary purpose of trip had been a business one, field agent's intentions, as disclosed by his declarations, were required to be evaluated in light of his later acts.
7. **WORKMEN'S COMPENSATION.**—In proceeding to recover compensation for death of field agent of Sales Tax Division of Tax Commission, who was killed in automobile accident while returning home from football game at city 75 miles from his home, on ground that primary purpose of trip had been a business one, evidence was insufficient to sustain finding of Industrial Commission that primary purpose of trip was a business one.

Messrs. Daniel R. McLeod, Attorney General, David Aiken, Assistant Attorney General, Whaley & McCutchen, Hoover C. Blanton, and Donald V. Richardson, III, all of Columbia, for Appellants, cite: As to the death of deceased not resulting from an accident arising out of and in the course of his employment: 215 S. C. 321, 54 S. E. (2d) 904; 218 S. C. 513, 63 S. E. (2d) 305; 219 S. C. 50, 64 S. E. (2d) 152; 226 S. C. 380, 85 S. E. (2d) 290; (S. C.) 113 S. E. (2d) 737; 225 S. C. 429, 82 S. E. (2d) 794; 26 N. J. Misc. 129, 57 Atl. (2d) 544; Larson on Workmen's Compensation, Sec. 19.29.

Messrs. Edens, Hammer & Glenn, of Columbia, and Callison & Dorn, of Greenwood, for Respondents, cite: As to the accident, in which deceased lost his life, being compen-

sable under the Workmen's Compensation Law: 189 S. C. 188, 200 S. E. 727; 232 S. C. 392, 102 S. E. (2d) 737; 227 S. C. 465, 88 S. E. (2d) 581; 231 S. C. 453, 60 S. E. (2d) 79; 196 S. C. 97, 12 S. E. (2d) 839; 206 S. C. 41, 32 S. E. (2d) 877; (S. C.) 115 S. E. (2d) 297; 71 C. J. 185-186; 234 S. C. 320, 108 S. E. (2d) 409; 207 S. C. 316, 35 S. E. (2d) 713; 225 S. C. 429, 82 S. E. (2d) 794; 1 *Larson's Workmen's Compensation Law* 240.

December 15, 1960.

OXNER, Justice.

This is a proceeding to recover workmen's compensation for the death of Albert J. Corley which occurred between the hours of 5:00 and 6:00 o'clock on the morning of October 24, 1958 as a result of an automobile accident. He had gone to Columbia on the previous day and was returning to his home in Greenwood, South Carolina, when he received the fatal injuries. The distance between these two cities is approximately 75 miles. The hearing Commissioner concluded that the trip to Columbia was made for decedent's own personal pleasure and denied compensation to his dependents. Upon review by the full Commission, this finding was reversed. The majority concluded that the work of decedent as a field agent of the Sales Tax Division of the South Carolina Tax Commission necessitated the journey to Columbia, or at least that it was one of the causes which impelled him to make that trip, and awarded compensation. On appeal to the Circuit Court, this award was affirmed. The appeal to this Court by the employer and the State Workmen's Compensation Fund followed.

Of course, it is the exclusive function of the Industrial Commission to settle questions of fact. The limit of the inquiry which this Court is permitted to make is whether there is any evidence reasonably tending to support the conclusions of the Commission.

The duties of decedent as a field agent of the Tax Commission included making investigations as to any unpaid

sales taxes, handling assessments and delinquent accounts, and occasionally assisting in making audits. His territory was restricted to Greenwood County and some adjacent areas. His immediate superior, Mallon P. Harris, a district supervisor, resided in Greenville. When decedent or any other field agent under Harris' supervision found it necessary to leave his territory, he was supposed to notify Harris' office, although he was at liberty to do so without permission in the event of an emergency. Occasionally it became necessary for a field agent to make a trip to Columbia to examine the files at the office of the Tax Commission.

The State Fair is held annually in October at Columbia. Until this year the Carolina-Clemson football game was played on Thursday of the week of the fair. This is always quite a colorful occasion attended by people throughout the State. It is referred to in the testimony as "Big Thursday", and is a legal holiday in Columbia. Section 64-152 of the 1952 Code. The testimony shows that the offices of the Tax Commission, as well as all other State offices in Columbia, are closed on that day. Each year the Tax Commission sends a memorandum to the district supervisors, stating that the Columbia office would be closed but that the district offices would remain open with all employees on duty unless they were going to the football game, in which event they could have a holiday. In 1958 this notice was not received by Harris until October 22nd, the day before the game, and, consequently, he did not have time to issue a memorandum and send it to the employees under his supervision.

During the early part of the week of the fair, decedent expressed to several friends some uncertainty as to whether he would be able to attend the game. His wife testified that he later told her it would be necessary for him to make a trip to Columbia to pick up some "transcripts and returns" to enable him to finish an audit; that on Wednesday, October 22nd, he tried unsuccessfully to contact Harris in Greenville by telephone so as to advise him of the necessity of going to Columbia to get the records; and that about 7:45

the following morning, the day of the game, he again tried to telephone Harris but was informed that he had gone to Columbia. According to her testimony, decedent remarked to her before leaving home that he "would just go on to Columbia and see him (Harris) down there" and would also pick up the transcripts and returns, but that it would be necessary for him to get to Columbia before 12:00 o'clock as the offices of the Tax Commission would probably be closed that afternoon.

It further appears that on Monday or Tuesday before the game Mr. Woodle, then senator from Greenwood County, told decedent that he wanted his assistance in a matter which he wasn't ready to discuss because he desired to first get some additional information. In trying to find a time when the two could conveniently meet, Senator Woodle said he would be in Greenwood all the week except Thursday, to which decedent replied: "Well, I am going to be in Columbia Thursday on business myself." They then arranged to meet at 1:00 o'clock at the fairground.

After leaving home about 8:30 on Thursday morning, decedent went to a cafe in Greenwood where he invited several friends to go with him to the game but stated that he would have to take his car as he had some work to do on the trip. One declined the invitation because he did not want his trip interrupted while decedent made business calls. Another of these friends, J. H. Hall, accepted. Hall and decedent then went in the latter's car to the Town of Ninety Six, a distance of approximately ten miles, where decedent attended to some tax business. The two men returned to Greenwood about 9:30 that morning where at a service station they ran across Henry S. Langston who was also invited to make the trip. Decedent, Hall and Langston left Greenwood about 10:00 o'clock and proceeded directly to Columbia. They passed through the city without stopping and went to a business establishment at Five Points, a shopping center in Columbia, which was operated by J. H. Epps, another friend of decedent. Upon arriving there about 12:00 o'clock or

shortly before, the three men got out of the car and went in this place of business, decedent taking his briefcase with him. Epps expressed surprise at seeing decedent as he had previously said he would be unable to attend the game, to which decedent replied: "Well, I didn't know until a few minutes ago or until this morning that I was going to come down." Hall and Langston were introduced to Epps who invited all three men to have lunch. He had some food in a room back of his office to take care of any friends who called. Decedent stated that before eating he would like to use the 'phone "to get a little information." Epps testified that while he did not hear the conversation and did not know what it was about, he did observe decedent using the 'phone and while doing so he had his briefcase open and was scratching on a pad which Epps kept on his desk. After this call, decedent and Langston ate lunch. Hall did not eat anything because he was on a diet. The three men left Epps' place of business between 12:30 and 1:00 and went directly to the fairground.

Decedent met Senator Woodle at the fairgrounds promptly at 1:00 o'clock as previously agreed upon. Due to the fact that decedent had with him two friends and Senator Woodle was accompanied by his wife, it was decided to postpone the discussion and the two men agreed to meet in Greenwood between 7:30 and 8:00 the next morning. Shortly after this meeting, Langston left Hall and decedent as he had to get a ticket. Hall and decedent sat together at the football game. After it was over the three men got together again and went to various places around the midway. All had some whiskey but there is no evidence that any of them became intoxicated. Hall became separated from decedent and Langston around 9:00 o'clock and after being unable to find them, proceeded to the city where he caught a 12:45 A. M. bus for his home in Greenwood. Later about 10:30 that night Langston and decedent, while watching some shows along the midway, became separated. Langston

was unable to find him, caught a ride to the city and also went home on the 12:45 bus.

The record does not disclose the whereabouts of decedent or what he did after he became separated from Hall and Langston. As previously stated, between five and six o'clock the next morning while returning home, his car was in collision with a truck a few miles south of Greenwood.

Harris testified that he knew of no business which would have necessitated decedent's making a trip to Columbia. The briefcase in the car was carefully examined after the accident and nothing was found therein indicating any business to be attended to in that city.

It is conceded that the trip to Columbia served a
3 personal purpose of allowing decedent to attend the football game but respondents say the primary purpose was a business one. This necessitates consideration of the dual purpose trip doctrine which we had occasion to discuss in *Sylvan v. Sylvan Bros., Inc.*, 225 S. C. 429, 82 S. E. (2d) 794, 797. We there quoted with approval the following from Section 18 of Larson's Workmen's Compensation Law: "Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey." This is in line with the following language of Judge Cardozo in the celebrated case of *Marks' Dependents v. Gray*, 251 N. Y. 90, 167 N. E. 181, 183:

"We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled. * * * The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own.

* * * If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk."

The burden was upon respondents to prove that decedent's work had at least a part in creating the necessity of the trip to Columbia. Of course, this could be shown by circumstantial evidence. Strongly relied on as a circumstance are the declarations by him as to his purpose. The admissibility of this testimony is conceded under the authority of *Ervin v. Myrtle Grove Plantation*, 206 S. C. 41, 32 S. E. (2d) 877, and in *Malphrus v. State Commission of Forestry*, 221 S. C. 75, 69 S. E. (2d) 70. But decedent's intentions as disclosed by these declarations must be evaluated in the light of his later acts, "since for many reasons the cup of intention and the lip of action may never meet." McCormick on Evidence, page 571. On page 574, this author says: "Declarations of intention to show circumstantially the later conduct of the declarant are obviously subject, like all circumstantial inferences, to hazards of miscarriage. The declarant may change his mind or he may find it impossible to carry out his purpose."

In considering these declarations, it will be first noted that some of them, particularly decedent's statement that it would be necessary to use his car, were made prior to the trip to Ninety Six, which admittedly was on business. This may have been the business transaction he had in mind since the town of Ninety Six is not much out of the way in going from Greenwood to Columbia. His statement to his wife before leaving home to the effect that he was going to Columbia to pick up some records at the office of the Tax Commission is rather difficult to understand in view of the fact, which he must have known, that the office would be closed on that day. But assuming that such was his intention, his subsequent conduct clearly shows that he

changed his mind. Although he told his wife it would be necessary to get to Columbia by 12:00 o'clock as the office would be closed that afternoon, when he reached that city around noon he made no effort to go by the office of the Tax Commission. Instead he went through the main part of Columbia without stopping and made a social call on a friend at Five Points, after which he went directly to the fairgrounds.

We now consider two incidents during decedent's stay in Columbia relied upon by respondents as showing that he carried out his purpose of making a business trip. The first is the fact that he made a 'phone call, with his briefcase open before him, while at the office of his friend at Five Points. But we do not know to whom he talked or what he talked about. It is rather unreasonable to suppose that he was calling the office of the Tax Commission or anyone connected with it since the office was closed. Moreover, his supervisor testified that he knew of no business decedent had to attend to in Columbia nor did any of the contents of his briefcase relate to the transaction of such business. It would be pure speculation to say that this telephone call was for business purposes.

In *Fowler v. Abbott Motor Co.*, 236 S. C. 226, 113 S. E. (2d) 737, 739, testimony similar to that above mentioned was held to be insufficient to show the transaction of business for the employer. In the *Fowler case* claimant was employed as a mechanic and service manager by an automobile dealer who furnished him with an automobile to use in answering service calls and paid the toll charges for a telephone located at his residence. He was subject to call any hour of the day or night. About eight o'clock one night, while driving his employer's automobile, he had an accident. The proof on the question of whether the claimant was on the business of his employer when the accident occurred consisted of testimony to the effect that shortly before leaving on this trip claimant answered a telephone call at his home and was heard to tell the caller "I'll see

about it", after which he told the members of his family, "I'll be back in a minute," and further testimony that after leaving home he stopped by a country store where he inquired about his uncle and said something to the effect that he had to see about a car motor. This testimony was held insufficient to support a finding that claimant's injury arose out of and in the course of his employment. The Court stated that the mere possibility that an employee was engaged in performing service on behalf of his employer at the time of his accidental injury was insufficient.

The other circumstance relied on to show that this was a business trip is the fulfillment of the engagement which decedent had with Senator Woodle at the fairgrounds. It could not be reasonably inferred from the evidence that this engagement created the necessity for the trip to Columbia or had any part in causing it. Both of these parties lived in Greenwood. Senator Woodle said that the matter he wished to discuss with decedent was of a local nature and so far as he knew involved nothing requiring a trip to Columbia. If for some reason the football game had been cancelled, the only reasonable inference from the evidence is that decedent would not have made the trip and would have seen Senator Woodle at some convenient time in Greenwood. It is equally true that if Senator Woodle had called off his appointment, decedent would have nevertheless gone to Columbia. In short, it could not be reasonably inferred that the matter which Senator Woodle desired to discuss sent decedent on his journey. Meeting the Senator in Columbia was a mere incident to the trip.

We conclude that any inference from decedent's
7 declarations that his work as field agent of the Tax
Commission sent him on this trip to Columbia was completely rebutted by his subsequent conduct. Either Hall or Langston was continuously with him from the time he left Greenwood until approximately 10:30 that night. We find nothing said or done during this period which could reasonably have been said to have caused the journey or

to have been a concurrent cause. Of course, we do not know what decedent did from 10:30 that night until he left for Greenwood early the next morning but it certainly would not be assumed that during that time he attempted to do any business.

In view of the foregoing conclusion, we need not pass upon the further interesting question raised by appellants to the effect that even if decedent made a business trip to Columbia, his social activities after his business was completed extended over such length of time as to remove him from the orbit of his employment in returning home. In this connection, see *Dooley v. Smith's Transfer Co.*, 57 A. (2d) 554, 26 N. J. Misc. 129; *White v. Frank Z. Sindlinger, Inc.*, 30 N. J. Super. 525, 105 A. (2d) 437.

Judgment reversed and case remanded to the Circuit Court for the purpose of vacating the award and dismissing the claim for compensation.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

17730

J. A. SHERBERT, Jr., Appellant, v. Ruby Nell SHERBERT,
Respondent

(117 S. E. (2d) 715)

Husband's action for divorce in which wife interposed counterclaim. The County Court of Spartanburg County, Charles M. Pace, J., entered decree granting divorce to wife on ground of physical cruelty and granted her separate maintenance together with custody of youngest child, and husband appealed. The Supreme Court, Oxner, J., held that wife did not sustain her charge of physical cruelty by preponderance of evidence.

Reversed and remanded.

1. DIVORCE.—Since divorce action was in equity Supreme Court was at liberty to review facts and weigh evidence, and because master

and county judge disagreed as to whether wife had established her charge of physical cruelty, Supreme Court would determine question according to its own view of evidence. Code 1952, § 20-105.

2. **DIVORCE.**—Supreme Court, in determining whether wife had established charge of physical cruelty as ground for divorce, must give proper consideration to fact that master saw the witnesses, heard testimony delivered from stand and had benefit of that personal observation of and contact with parties and witnesses.
3. **DIVORCE.**—Wife failed to sustain her charge of physical cruelty by preponderance of evidence in divorce action.

Messrs. Poliakoff & Poliakoff and Moore & Stoddard, of Spartanburg, for Appellant, cite: As to findings of fact by Master being of greater weight than finding by circuit Judge based on the cold record: 6 S. C. 140; 183 S. C. 85, 190 S. E. 104. As to presumption that a witness easily available, but not produced, would have been adverse: 1 Wigmore on Evidence, Sec. 285; 156 S. C. 181, 153 S. E. 133; Whaley's Handbook on South Carolina Evidence 166. As to where the evidence is in doubt, the findings of the Master should not be disturbed: 3 Am. Jur. 463, Sec. 897; 3 Am. Jur. 480, Sec. 912.

Arnold R. Merchant, Esq., of Spartanburg, for Respondent.

January 5, 1961.

OXNER, Justice.

This action was brought on August 22, 1959 by a husband for a divorce on the grounds of adultery and desertion. He also asked that he be awarded custody of the children. His wife denied the charges made against her and interposed a counterclaim in the nature of a cross-action wherein she sought a divorce on the ground of physical cruelty. She also asked for separate maintenance and custody of the children.

The case was referred to the Master for Spartanburg County who after taking considerable testimony filed a report on March 15, 1960 in which he found that the husband had failed to establish the charge of adultery; that while the

wife had left the home without just cause, the desertion had not continued for the required period of one year; and that the wife had failed to prove the charge of physical cruelty. He accordingly recommended that neither party be granted a divorce, that separate maintenance to the wife be denied, and that the custody of the children be given to the husband with visitation privileges to the wife. The case was heard by the County Judge on exceptions to the Master's Report. In an order filed on April 18, 1960, he agreed with the Master that the husband had shown no ground for divorce but held that the wife had established her charge of physical cruelty and was entitled to a divorce on that ground. At the time the action was commenced, there were only two children and proceedings relating to their custody were pending in the Children's Court of Spartanburg County. After the hearing before the Master a third child was born. The County Judge held that the question of custody of the two older children should remain in the jurisdiction of the Children's Court but that the mother was entitled to custody of the third child. He further required the husband to pay to his wife the sum of \$10.00 weekly for her maintenance and that of the youngest child.

The case is here on appeal by the husband from the decree of the County Judge. He does not challenge the denial of the divorce sought by him. The only questions presented by his exceptions are whether the Court below erred in holding that his wife was entitled to a divorce on the ground of physical cruelty and whether there was error in granting her separate maintenance.

This action is one in equity. Section 20-105 of the 1, 2 1952 Code; *Harvey v. Harvey*, 230 S. C. 457, 96 S. E. (2d) 469; *Dobson v. Atkinson*, 232 S. C. 12, 100 S. E. (2d) 531. We are, therefore, at liberty to review the facts and weigh the evidence. Since the Master and County Judge disagreed as to whether respondent had established her charge of physical cruelty, we shall determine the question according to our own view of the evidence. *Troy Ceme-*

tery Association, Inc. v. Davis, 223 S. C. 305, 75 S. E. (2d) 458. In doing so, proper consideration must be given to the fact that, "the Master saw the witnesses, heard the testimony delivered from the stand, and had the benefit of that personal observation of and contact with parties and witnesses which may be of peculiar value in arriving at a correct result in a case of this character." *Badder v. Saleeby*, 131 S. C. 101, 126 S. E. 438, 440. Also, see *Hughey v. Eichelberger*, 11 S. C. 36; *Taylor v. Barker*, 30 S. C. 238, 9 S. E. 115.

Both appellant and respondent are natives of Spartanburg County. They were married on April 28, 1952. He was then 36 and she 14 years of age. They lived in a rural section of Spartanburg County and he worked in a textile plant. It was not long before discord developed. They have been separated four or five times, the first occurring about a year after they were married. The fourth took place in January, 1959. Shortly after this separation, appellant brought a proceeding in the Children's Court of Spartanburg County to obtain custody of their two children, who at that time were approximately two and four years of age. In an order filed on March 6, 1959, the Judge of that Court awarded custody to the mother. In a subsequent order on May 8, 1959, custody was given to the father, principally because respondent had left the home of her parents and was then living alone in a rooming house. On June 28, 1959, respondent returned to appellant's home and they lived together about a month before the final separation. It was apparently during this period that respondent became pregnant with the third child.

Respondent contends that on each occasion when they separated she was compelled to leave because he "beat her up". However, she also complains that on numerous occasions he left home at night under the pretext of going to feed the cows and would not return until about bedtime, and that he never went out with her in the evenings. The following is taken from her testimony in the Children's Court, which was made a part of the record:

"Q. What is your biggest complaint about your marriage? A. That he is never with us."

In the instant action, she testified:

"Q. Did you leave your husband because he was gone at night or because he beat you? A. Both, but mostly because he beat me.

* * *

"Q. You say the main reason you left your husband because he would be gone away from home and because he wouldn't take you places? A. Well, he never did take me places.

"Q. You didn't like that, isn't that true? A. No, I didn't like it.

"Q. That was most of your arguments because he wouldn't take you places, isn't that right? A. Part of them.

"Q. That is the main reason you don't want to live with him? A. No, not arguing.

"Q. Is that part of the reason? A. That and him beating on me.

"Q. But mostly that? A. No, but I don't like to sit down there all the time."

Appellant vigorously denied that he had ever struck respondent or otherwise mistreated her, claiming that he had always been a kind and considerate husband.

The County Judge may have pinpointed the real source of the difficulty when, after referring to the difference in the ages of the parties, he stated in his decree that "the basic trouble in the present marriage appears to be incompatibility between the parties." Incidentally, this appears to be somewhat inconsistent with his conclusion that the separation was brought about by physical cruelty on the part of appellant.

Although respondent claims that she was severely beaten and bruised on numerous occasions, she admitted that she never called any law enforcement officer, giving as a reason

for not doing so that all of these officers were friends of her husband's. Several of the neighbors testified that they had never heard of any physical mistreatment. Although respondent said that some of the bruises were on her face where they were clearly visible, no one testified to seeing them except her mother and sister-in-law.

Particular complaint is made of physical cruelty on two occasions. Respondent testified that several years after her marriage and before the birth of her first child, appellant "kicked her in the stomach", resulting in a miscarriage. She was treated for her miscarriage by a local physician but he was not called to testify as to the cause of it. Her testimony as to the other incident emphasized was to the effect that about four years ago her husband, while cleaning a gun, threatened to shoot her. She said that during an argument he drew the gun on her, that she knocked it out of his hand and it discharged. According to her testimony, she then fainted and was taken from her home to the hospital. A neighbor testified that he heard a shot and someone scream, whereupon he had the officers called. Two rural policemen, who answered the call, testified that upon arriving at the home they found respondent lying on the floor but saw no evidence of injury. These officers said the only other person then in the house was respondent's mother and they were unable to get any explanation of what had happened. One of them said that frankly he "never did understand that call", and that appellant did not come to the house until some time later. The neighbor who had the officers called said that he was satisfied that appellant was not present at the time of this occurrence. It will be noted that both of these incidents took place long before the final separation.

It is apparent from the foregoing brief summary of
3 the testimony that there is a sharp conflict on the issue of physical cruelty. The Referee who heard this case is an able lawyer of long experience as Master of Spartanburg County. He evidently rejected the testimony of respondent relating to physical cruelty and we cannot say

under all the circumstances that he erred in doing so. An independent consideration of the entire record leads us to the conclusion that respondent has not sustained her charge of physical cruelty by the preponderance of the evidence.

So much of the decree of the County Judge as granted respondent a divorce and alimony is reversed. Although appellant denied the paternity of the child born after the Master heard the case, there is no exception to that portion of the decree holding that he was the father and requiring him to support this child. The case is remanded to the County Court for further proceedings in accordance with the views herein expressed.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

17729

William L. CHILDS, Respondent, v. ALLSTATE INSURANCE
COMPANY, Appellant
(117 S. E. (2d) 867)

Action on automobile policy. The Common Pleas Court, Greenwood County, John Grimball, J., entered judgment for plaintiff, and the defendant appealed. The Supreme Court, Stukes, C. J., held that insured who recovered judgment against uninsured motorist for personal injuries sustained in collision with motorist could recover amount thereof from insurer notwithstanding that insured did not obtain insurer's permission to bring action as required by uninsured motorist coverage portions of policy, where insurer had denied all liability on policy.

Affirmed.

1. INSURANCE.—The provision, in uninsured motorist coverage portions of policy, requiring arbitration of question of liability of uninsured motorist for injuries sustained by insured, was unenforceable.
2. INSURANCE.—Insured who recovered judgment against uninsured motorist for personal injuries sustained in collision with motorist could recover amount thereof from insurer notwithstanding that

insured did not obtain insurer's permission to bring action as required by uninsured motorist coverage portions of policy, where insurer had denied all liability on policy.

3. **APPEAL AND ERROR.**—No prejudice to defendant could arise from instructions or failure to instruct where plaintiff would have been entitled to directed verdict in exact amount of jury's verdict if timely motion for directed verdict had been made.

Messrs. Haynsworth, Perry, Bryant, Marion & Johnstone, of Greenville, for Appellant, cite: As to it being a condition precedent to the institution of an action against an insurance company under an uninsured motorist endorsement of an automobile liability policy that an arbitration be held on the question of: (a) whether the insured is entitled to recover from the third party; and (b) if so entitled to recover, the amount of such recovery: 228 S. C. 594, 91 S. E. (2d) 273; 173 N. Y. Sup. (2d) 941; 187 N. Y. Sup. (2d) 103 affirmed 188 N. Y. Sup. (2d) 939; 187 N. Y. Sup. (2d) 534; 193 N. Y. Sup. (2d) 361; 191 N. Y. Sup. (2d) 852. As to duty on trial Judge to construe arbitration provision of policy where no ambiguity appears: 230 S. C. 131, 94 S. E. (2d) 397; 92 S. C. 263, 75 S. E. 452; 187 N. Y. Sup. (2d) 534; 228 S. C. 594, 91 S. E. (2d) 273; 210 S. C. 336, 42 S. E. (2d) 537.

J. Perrin Anderson, Esq., of Greenwood, for Respondent.
January 3, 1961.

STUKES, Chief Justice.

This is an appeal from a judgment obtained by reason of appellant's liability under its policy of automobile insurance, issued to respondent, Sec. II of which is entitled, "Protection against bodily injury by uninsured automobiles."

The specific provisions here involved follow:

"Allstate will pay all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such automobile.

* * *

"Exclusions—What This Section Does Not Cover

"This Section of the Policy does not apply :

* * *

"2. to bodily injury of an insured with respect to which such insured or his representative shall, without the written consent of Allstate, make any settlement with, or prosecute to judgment any action against, any person or organization who may be legally liable therefor ; or

* * *

"Notice of Legal Action

"If, before Allstate makes payment of loss hereunder, the insured or his representative shall institute any legal action for bodily injury against any other person operating an automobile involved in the accident, a copy of the Summons and Complaint or other process served in connection with such legal action shall be forwarded immediately to Allstate.

* * *

"Determination of Legal Liability and Amount of Damages.

"The determination as to whether the insured shall be legally entitled to recover damages, and if so entitled the amount thereof, shall be made by agreement between the insured and Allstate.

"In the event of disagreement and upon written demand of either, the matter or matters upon which the insured and Allstate do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof. The insured and Allstate each agree to consider itself bound and to be bound by any award made by the Arbitrator(s) pursuant to this section II. * * *"

Respondent was in collision with one Cunningham. Upon report of the accident appellant investigated it and determined that it resulted from the fault of its insured, the respondent, and it settled with Cunningham his claim against

the insured for damage to his automobile by paying him the amount thereof, apparently without prior notice to respondent.

Upon appellant's refusal of respondent's claim for damages for personal injuries which he received in the collision, respondent brought action against Cunningham and recovered judgment by default in the sum of \$1,500.00. It is for that amount and costs that the instant action was brought.

Meanwhile there had been correspondence between respondent's attorney and the Claims Manager of appellant. Under date of June 2, 1959, the latter wrote respondent's attorney in part as follows: "With respect to the questions raised in the second paragraph of your letter of May 28, we have been advised by the Cunninghams that there is no liability insurance on their car. On the other hand, our investigation of the accident indicated that Mr. Childs was responsible for this accident, and hence, could not have any claim under the uninsured motorist coverage. As a result of our investigation of the accident, and our determination of the liability as resting on our insured, we have settled the property damage claim of the Cunninghams." On September 21 following, the attorney wrote the Claims Manager that action had been instituted in behalf of respondent (against Cunningham) for damages for personal injuries and enclosed copies of the suit papers, which he advised was in accordance with the terms of the policy. The Claims Manager replied under date of October 9 as follows: "This is to advise you that this suit was instituted without the written consent of Allstate Insurance Company as provided under Paragraph 2 on Page seven of the Allstate Crusader Policy, said paragraph being listed under the Section entitled 'Exclusions—What this section does not cover (2.) To bodily injury on insured with respect to which such insured or his representative shall, without the written consent of Allstate, make any settlement with or prosecute to judgment any action against, any person or organization who may be legally liable therefor;' * * * I call attention to the fact that

a prosecution to judgment in this action against Mr. Cunningham would relieve Allstate of any obligations under the bodily injury benefit insurance protection of Mr. Childs' policy."

Afterward, on December 14, the Claims Manager made written refusal of respondent's claim, as follows: "Since you have prosecuted Mr. Child's action to judgment against Mr. Cunningham, there is no liability on the part of Allstate Insurance Company under Mr. Child's uninsured motorist coverage.

"As pointed out to you in my letter of October 9th, Allstate did not consent to the entering of this suit and the taking of his judgment, and, consequently, you have been in violation of the exclusion of the uninsured motorist coverage of Mr. Child's policy.

"Under the circumstances, Mr. Childs has violated his policies and brought himself under the exclusions set forth therein. We therefore decline to make any payment on this claim."

Appellant moved successively for nonsuit, directed verdict, that respondent had not complied with the policy provision for arbitration and pleaded the "exclusion", above quoted, forbidding action by respondent without written consent of appellant.

Appellant moved successively for nonsuit, directed verdict judgment *n. o. v.*, and new trial upon the grounds set up in its answer, that respondent had made no demand for arbitration and had brought action against Cunningham without the consent of appellant. The trial motions were denied and the case was submitted to the jury which returned verdict for respondent. Appellant's post-verdict motions were also denied. The appeal is from judgment entered upon the verdict.

The first ground is that arbitration under the terms
1 of the policy was a condition precedent to action thereupon.

The purported agreement for arbitration is unenforceable under the decisions of this court. *Jones v. Enoree Power Co.*, 92 S. C. 263, 75 S. E. 452; *Harwell v. Home Mut. Fire Ins. Co.*, 228 S. C. 594, 91 S. E. (2d) 273. Cf. *Hines v. Farr*, 235 S. C. 436, 111 S. E. (2d) 33. Such an agreement is upheld when it provides for arbitration of the amount of the loss but that at hand undertakes to require arbitration of the question of liability and is, therefore, not binding upon the parties. *Ibid.* The rules enunciated in the foregoing decisions are stated in 29A Am. Jur. 699, Insurance, sec. 1611, as follows:

"In accordance with general principles applicable to all contracts, it is the rule that a provision in an insurance policy that all disputes arising under the policy shall be submitted to arbitrators, or a provision similar in substance and effect, is not binding. On the other hand, the view prevailing in nearly all jurisdictions is that a stipulation not ousting the jurisdiction of the courts, but leaving the general question of liability for a loss to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is valid."

Uninsured automobile coverage is referred to as a recent innovation in supplemental section 4104.5 of Volume 6, part 2, Perm. Ed. of Blashfield's Automobile Law and Practice. It is also briefly treated in supplemental section 4331 of Volume 7 of Appleman, Insurance Law and Practice, and likewise in supplemental section 82.5 to 5A Am. Jur., Automobile Insurance.

Appellant cites several New York lower court decisions (e. g., *Chernick v. Hartford Accident & Indemnity Co.*, 8 A. D. (2d) 264, 187 N. Y. S. (2d) 534) in which arbitration agreements in automobile insurance policies have been upheld; but such is done under the Civil Practice Act of that State, of which we have no counterpart; Secs. 10-1901 *et seq.* of our Code of 1952 fall short of it. See *Jones v. Enoree Power Co.*, *supra*. It embraces the New York Arbitration

Law of 1920. All of this is made plain in the opinion by Chief Judge Conway of the Court of Appeals in *American Reserve Ins. Co. v. China Ins. Co.*, 1948, 297 N. Y. 322, 79 N. E. (2d) 425, 426, which was an action for balance of premiums on reinsurance and attachment of local bank deposit of the foreign defendant. It pleaded an arbitration clause of the contract. The court held that defendant's only remedy was an action for stay. It was said: "Before the adoption of the Arbitration Law in 1920, a party might disregard his agreement to arbitrate all disputes under a contract, for such agreements were held to be attempts to 'oust a court of law or equity of jurisdiction', and there was no effective means of enforcing them. * * * It was only through actions by the Legislature that these difficulties were removed." Sec. 5 of the Arbitration Law, now Sec. 1451 of the Civil Practice Act, provides for stay of action brought in violation of an arbitration agreement, which is the exclusive remedy. Quoting again from the opinion: "The Legislature has provided a means of enforcing that which was previously unenforceable; the defendant in such an action must use those means or none at all. This court has indicated—and lower courts have held—that it is not even proper for the defendant in such an action to plead the arbitration agreement as a defense or counterclaim." (Citing cases.)

Distinction under the New York Law between appraisal and arbitration (provision for the former being generally enforceable under our decisions, the latter not) was made in *Matter of Delmar Box Co. (Aetna Ins. Co.)*, 1955, 309 N. Y. 60, 127 N. E. (2d) 808, 810, where the question was whether the insured under a fire insurance policy could compel the insurer to comply with the appraisal provision of the policy. The court said: "A number of basic distinctions have long prevailed between an appraisement under the standard fire policy and a statutory arbitration. An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties, upon which judgment may be entered after judicial confirmation of the

arbitration award, Civ. Prac. Act, § 1464, while the agreement for appraisal extends merely to the resolution of the specific issues of actual cash value and the amount of loss, all other issues being reserved for determination in a plenary action."

The first ground of appeal is without merit.

The second is that respondent is barred of recovery

2 because he brought action against Cunningham without appellant's permission, in violation of a provision of the policy which is quoted above.

Having determined independently and for itself without arbitral or other apparent aid, that respondent was at fault and legally responsible for the collision with the uninsured driver (whose property damage claim it paid) and having on that account denied liability to respondent under the uninsured motorist provision of the policy, appellant is simply not in position to invoke this provision of the policy. We are not called upon in this case to consider its efficacy and validity under other circumstances. We deal here only with the facts which have been stated, particularly in the quoted correspondence.

In point is the fire insurance case of *Batson v. South Carolina Mut. Ins. Co.*, 78 S. C. 309, 58 S. E. 936. There the policy provided:

"It is mutually agreed that no suit or action against this company for the collection of any claims against it shall be sustainable in any court of law until after an award shall have been obtained, fixing the amount of such claim in the manner provided, and not until after an assessment has been made against the policies then liable for their pro rata share due on each policy according to the sum fixed by said award; and in all cases the burden of proof shall be upon the assured to prove affirmatively as a part of his case in chief that the award has been obtained or duly waived by the company after the assured had made tender of such arbitration in writing, which writing shall be the only competent evidence of

such tender; and provided further, that the assured shall assume the burden of proof and prove affirmatively that such assessment has been made by the company, or that the assured has taken such legal steps as may have been necessary to compel such assessment in case the company shall have refused to make the same. The amount received from said assessment shall fix the liability of the company for said loss."

The defendant insurer denied all liability on the policy and the question was whether the action could be maintained without compliance with the foregoing provision. It was held and said: "This question has been recently considered in *Thompson v. Piedmont Mutual Ins. Co.*, 77 S. C. 486, 58 S. E. 341, and the conclusion reached was that when an insurance company denies all liability and refuses to make an assessment, an action at law is maintainable to recover the amount of damages which the insured would be entitled to recover if the company had performed its part of the contract."

In appellant's brief the third and final question is stated as follows: "Did the trial judge err in submitting certain charges relating, among other things, to waiver and estoppel, the reasonableness of an arbitration clause in an insurance policy to the jury and his refusal to charge certain requested charges of the defendant relating to arbitration and consent as defined by the terms of the policy?"

It is unnecessary to examine the instructions, and the denial of requested instructions, to the jury because appellant could not have been prejudiced by any such, however erroneous they may have been. This results from the consideration that under the undisputed facts respondent was entitled to the direction of verdict in his favor had proper and timely motion therefor been made, in the exact amount returned by the jury. Therefore no prejudice to appellant could have arisen from the instructions or from the failure to instruct.

In another view, the same result is reached. The case may fairly be said to come within the rule of *Mitchell v. Leech*, 69 S. C. 413, 48 S. E. 290, 293, 66 L. R. A. 723, 104 Am. St. Rep. 811, there stated by the court as follows: "The presiding judge should have construed the instruments of writing introduced in evidence, and in the manner just stated, but his failure to do so was not prejudicial to the appellants, for his charge gave the jury the opportunity of finding against the plaintiff upon a question of fact that should not have been submitted to them." Likewise, here, submission of issues to the jury may have resulted in verdict for appellant, to which it was not entitled. It cannot complain.

Affirmed.

TAYLOR, OXNER, LEGGE and MOSS, JJ., concur.

17731

Jeff. WESTON, as Administrator of the Estate of Melvin Weston,
Appellant, v. NATIONWIDE MUTUAL INSURANCE
COMPANY, Respondent
(118 S. E. (2d) 67)

Action for death of child who was struck by insured school bus. The County Court, Richland County, Legare Bates, J., granted a nonsuit, and plaintiff appealed. The Supreme Court, Taylor, J., held that evidence was sufficient to take to jury question whether child had been attempting to board bus or whether as plaintiff contended, he was within class of third persons entitled to greater pecuniary recovery under insurance statutes.

Reversed.

1. INSURANCE.—Statutes relating to school bus insurance were intended to provide for two forms of coverage: (1) for school children without regard to fault or negligence while doing certain acts in connection with school attendance; and (2) for negligent injury to members of the general public or persons not making use of the facilities for purpose of attending school. Code 1952, §§ 21-840, 21-840.2, 21-840.4.

2. INSURANCE.—Evidence in action for death of child who was struck by insured school bus was sufficient to take to jury question whether child had been attempting to board bus or whether, as plaintiff contended, he was within class of third persons entitled to greater pecuniary recovery under insurance statutes. Code 1952, §§ 21-840, 21-840.2, 21-840.4.

Messrs. Taylor, Rodgers & Cordell, of Columbia, for *Appellant*, cite: *As to rule that if more than one reasonable inference can be drawn from the testimony, or if the inferences to be drawn from the testimony are in doubt, the case should be submitted to the jury*: 204 S. C. 537, 30 S. E. (2d) 499; 189 S. C. 366, 1 S. E. (2d) 234; (S. C.) 112 S. E. (2d) 400. *As to construction of Section 21-840.2 of the Code of Laws of South Carolina, 1952, as amended*: 222 S. C. 405, 82 S. E. (2d) 511; 223 S. C. 143, 74 S. E. (2d) 580; 222 S. C. 405, 82 S. E. (2d) 511. *As to all rules for statutory construction being servient to the one that the Legislative intent must prevail if it can be reasonably discovered in the language used, which must be construed in light of the intended purpose*: 210 S. C. 163, 41 S. E. (2d) 868.

Messrs. Nelson, Mullins & Grier, of Columbia, for *Respondent*, cite: *As to trial Judge properly ordering nonsuit in instant case*: 223 S. C. 143, 74 S. E. (2d) 580; 225 S. C. 405, 82 S. E. (2d) 511.

January 10, 1961.

TAYLOR, Justice.

This appeal arises out of an action brought in the County Court for Richland County by the administrator of the estate of Melvin Weston, a minor under the age of seven years, seeking damages for his wrongful death in the amount of \$5,000.00 under the provisions of Sec. 21-840.2(2), Code of Laws of South Carolina, 1952, as amended.

Decedent, at the time of his death on April 15, 1959, was enrolled in the First Grade of Gadsden Elementary School in Richland County but had not attended school since April 7, 1959. On the date in question, he was struck by a school

bus, which was being used at the time to transport pupils to the Gadsden Elementary School and was the one which he would have occupied had he attended school on that day.

Upon conclusion of the plaintiff's testimony, defendant moved for a nonsuit on the ground that the case fell within the provisions of Section 21-840.2(1) and not within the provisions of the second section of the aforesaid Act. Defendant's motion was granted upon the ground that there had been no showing that the deceased was a third party, and the sole question presented in this appeal is whether the trial Judge erred in his conclusion that plaintiff's case came within the provisions of paragraph (1) of Sec. 21-840.2 of the Code of Laws of South Carolina, 1952, as amended, or whether it fell under the provisions of paragraph (2) of said section of the Code.

As heretofore stated, the deceased had last attended school on April 7, 1959, and plaintiff contends that it was not his intention to do so at the time he was struck by the bus and killed; hence, the coverage applicable to instant case falls within the provisions of paragraph (2) of said Act.

There is testimony that decedent, on that date, was not feeling well, had not eaten breakfast, and was not dressed for school. His mother testified:

"A. I got up that morning between 5:30 and 6:00 o'clock. I fixed breakfast. Well, when Melvin woked up he was crying and he refused to eat any breakfast because he wasn't feeling well and he wasn't going to school that morning. In fact, he hadn't been to school that entire week."

* * *

"Q. Did Melvin eat any breakfast that morning? A. No, sir, he didn't."

* * *

"Q. Okay. And had he gone to school that week? A. No, sir, he had not."

* * *

"Q. Well, go ahead. You said—after breakfast what happened? A. Well, after breakfast, I got him dressed. I dressed

him in his dirty bluejeans that he had been playing in all that week because he wasn't going to school and there was no use to get him dressed to go to school because he wasn't going. So I carried him over to his grandmother's house where he was going to stay the rest of the day. I put him out about 7:15 and then I went down to pick up some more girls that ride to work with me."

Robert Weston, brother of the deceased, testified:

"Q. How was little Melvin dressed? A. He was dressed in dirty clothes.

"Q. In what? A. Dirty clothes.

"Q. When he went to school, how was he dressed? A. He was dressed in clean clothes."

* * *

"Q. Who normally leaves with you when you go to get on the bus? A. Me and Leroy and Melvin.

"Q. You and Leroy and Melvin? A. Yes.

"Q. The three of you leave together? A. Yes, sir.

"Q. But on this morning, just you and Leroy left? A. Yes, sir."

There is further testimony to the effect that Robert, Melvin's brother, left the house to board the bus forgetting his lunch money, that he "laid it on the table to go get a book and I forgot about it." After he left his grandmother's house, he boarded the bus and the bus driver shut the door and was in the act of pulling off when Melvin ran across the road and was struck by the bus and killed. Further, within reach of the body was a ten cent piece, which ordinarily was given to the children to pay for lunch while attending school, it being plaintiff's contention that the younger brother was in the act of trying to carry the lunch money to the older brother when he was struck and killed and, therefore, was not a person riding the school bus or one who qualified for benefits under paragraph (1) of Sec. 21-840.2 of the Code of Laws of South Carolina, 1952, as amended.

Section 21-840 of the Code of Laws of South Carolina, 1952, as amended, requires insurance for State-owned busses, and Secs. 21-840.2 and 21-840.4 set forth the benefits provided, as follows:

"The insurance contracts shall provide the following benefits:

"(1) For a lawful occupant of any such school bus who suffers personal injuries or death, a death benefit of two thousand dollars and an amount sufficient to defray the cost of hospitalization, surgery, dentistry, medicine and all other medical expenses up to three thousand dollars, but not more than one hundred fifty dollars for dentistry; and dismemberment and loss of sight benefits as follows:

"(a) For loss of both hands or both feet or sight of both eyes, two thousand dollars;

"(b) For loss of one hand and one foot, two thousand dollars;

"(c) For loss of either hand or foot and sight of one eye, two thousand dollars; and

"(d) For loss of either hand or foot or sight of one eye, one thousand dollars;

"(2) For any person, other than a person riding in a school bus, or a person who qualifies for benefits under paragraph (1), who suffers personal injuries or death because of the negligent operation of any such school bus, an amount not exceeding five thousand dollars for any one person nor more than twenty-five thousand dollars for any one accident; and

"(3) For any person, other than a person who qualifies for benefits under paragraph (1), whose property is damaged because of the negligent operation of any such school bus, an amount not exceeding five thousand dollars."

Section 21-840.4. "Negligence irrelevant in certain cases; accidents covered.

"The benefits provided for in paragraph (1) of Section 21-840.2 shall exist without regard to fault or negligence. The insurance shall cover any accident which occurs:

- “(1) While getting on a school bus;
- “(2) While riding within a school bus;
- “(3) By being thrown from within a school bus;
- “(4) While getting off a school bus;
- “(5) By being run down, struck, or run over by a school bus;
- “(6) By being run down, struck or run over while crossing a public highway while approaching or leaving a school bus at the point of loading or unloading; or
- “(7) By being run down, struck or run over by any moving vehicle while enroute between home and the point of loading or enroute between the point of unloading and home.”

In *Collins v. National Surety Corp.*, 225 S. C. 405, 82 S. E. (2d) 511, 512, the decedent while engaged in supervised play on the school ground was struck and killed by a school bus being backed over him. This Court in passing upon the question of what coverage was applicable stated:

“ * * * The distinction which appellant would make is that he is a beneficiary of the insurance coverage which is responsive to section 1(a) (1) and also 1(a) (2). This is clearly untenable because the coverage provided by the last cited section 1(a) (2) is, quoting it, ‘For any person, other than a person riding on a school bus, or a person who qualifies for benefits under paragraph (1), who suffers personal injuries or death because of the negligent operation of any school bus * * *.’ This is plainly a ‘third person’ provision (as is the property damage insurance provided by 1(a) (3)) which accrues to the benefit of any member of the public. It excludes and excepts, by use of the words ‘other than’, a person riding on a school bus or a person who is within the protection of 1(a) (1). We have already quoted the provision which brings plaintiff within that protection and thereby excludes him from that of 1(a) (2).” See also *Farmer v. National Surety Corp.*, 223 S. C. 143, 74 S. E. (2d) 580.

Respondent contends that the facts of this case fall within Sec. 21-840.4 which makes specific reference to Sec. 21-840.2 (1) and sets forth that the benefits provided thereunder shall exist without regard to negligence. Sec. 21-840.2(2), however, provides coverage for "any person, other than a person riding in a school bus, or a person who qualifies for benefits under paragraph (1)."

To reconcile the various provisions of the aforementioned acts is attended with some difficulty. It is evident, however, that the Legislature intended to provide for two forms of coverage, one, providing coverage for school children without regard to fault or negligence while doing certain acts in connection with school attendance and, two, where a member of the general public or persons not making use of the facilities for the purpose of attending school are injured by the negligent operation of the school bus.

If the deceased was attempting to board the bus for the purpose of attending school, this case is controlled by *Farmer v. National Surety Corp.*, *supra*, and the Order appealed from should be affirmed. If, however, as contended by plaintiff, the decedent, when injured, was attempting to deliver the forgotten lunch money to his brother and was not attempting to board the bus, he would occupy the position of a "third party" as referred to in *Collins v. National Surety Corp.*, *supra*, and would be required to show negligence on the part of the driver before recovery could be had.

We are of opinion that the question of whether decedent was or was not at the time of injury and death attempting to board the bus for the purpose of attending school was a question for the jury, that the Order appealed from should be reversed and the case remanded for trial in accordance with the foregoing; and it is so ordered. Reversed.

STUKES, C. J., and OXNER, LEGGE and MOSS, JJ., concur.

17732

DEPENDENTS OF John D. SWEENEY (Grace A. Sweeney et al.)
and U. S. G. Sweeney, Administrator of the Estate of John D.
Sweeney, Appellants, v. CAPE FEAR WOOD CORPORATION
and Employers Mutual Liability Insurance Company, Respondents.
(118 S. E. (2d) 70)

Proceeding to review denial by Industrial Commission of workmen's compensation death benefits. The Common Pleas Court, Horry County, G. Badger Baker, J., affirmed decision, and claimants appealed. The Supreme Court, Stukes, C. J., held that filing with Industrial Commission, by workmen's compensation carrier of company, which was under workmen's compensation in another state but was exempt from South Carolina Workmen's Compensation Law, without company's knowledge, of a workmen's compensation policy purporting to be in force as to company within South Carolina, did not constitute an election by company to come under South Carolina workmen's compensation statute.

Affirmed.

1. WORKMEN'S COMPENSATION.—Filing with Industrial Commission by workmen's compensation carrier of company, which was under workmen's compensation in another state but was exempt from South Carolina Workmen's Compensation Law, without company's knowledge, of workmen's compensation policy purporting to be in force as to company within South Carolina, did not constitute an election by company to come under South Carolina workmen's compensation statute. Code 1952, §§ 72-107(2, 4), 72-109.
2. WORKMEN'S COMPENSATION.—Industrial Commission was without jurisdiction over workmen's compensation claim against company which was exempt from coverage and had not elected to come under the workmen's compensation statute. Code 1952, §§ 72-107(2, 4), 72-109.

Robert L. Gray, Esq., of Laurens, for Appellants, cites: As to there being a waiver and a voluntary election to come under the terms of the Act and that fact is clearly shown by a study of the testimony in this case: 210 S. C. 173, 41 S. E. (2d) 872; 212 S. C. 586, 48 S. E. (2d) 447; 106 S. E. (2d) 367; 54 S. E. (2d) 545; 52 S. E. (2d) 879;

15 S. E. (2d) 833; 71 C. J. 519; 101 Mont. 212, 53 Pac. (2d) 704; 193 S. C. 66, 7 S. E. (2d) 712.

Messrs. Burroughs & Green, of Conway, for Respondents, cite: As to the importance of the elements of the filing of a notice with the Commission and the action of the Commission in acknowledging receipt of the insurance: (S. C.) 110 S. E. (2d) 8; 222 S. C. 226, 72 S. E. (2d) 453. As to the definition of waiver being the voluntary relinquishment of a known right: 193 S. C. 444, 8 S. E. (2d) 748. As to right of Respondent in event of reversal, to have question of employer-employee relationship passed upon: 201 S. C. 315, 23 S. E. (2d) 9.

January 10, 1961.

STUKES, Chief Justice.

This is an appeal from denial of a claim for workmen's compensation on account of the death of John D. Sweeney. The Industrial Commission denied the claim because it found that there was no employer-employee relation between the decedent and the defendant, and because the latter is exempt from the law under the terms of Code Section 72-107(2) (requiring minimum number of employees in this State), and also exempt perforce section 72-107(4) as it is engaged in, quoting from the statute, "logging operations and work incident thereto." Upon appeal, the court affirmed the decision of the commission upon the exemptions of the defendant from the compensation law and did not pass upon the ground of denial relating to the employer-employee relationship.

Upon appeal, to this court the claimants concede, in effect, the correctness of the decision concerning the exemptions of the defendant from the law but contend that it waived such. The applicable Code provision is section 72-109, as follows:

"Any person employing employees in State and exempted from the mandatory provisions of this Title may come in under the terms of this Title and receive the benefits and be

subject to the liabilities of this Title by filing with the Commission a written notice of his desire to be subject to the terms and provisions of this Title. Any such person shall come under the provisions of this Title and be affected thereby thirty days after the date of such notice."

The respondent Cape Fear etc. is a corporation under the laws of North Carolina with its principal place of business in Elizabethtown in that State, is not domesticated here, but it has an office, records and one employee at Conway in this State. It is a dealer or broker in pulpwood. It bought the pulpwood trees on a small tract of land in this State, sold the pulpwood to Sweeney at a unit price and bargained to pay him for it cut and delivered at a receiving station in North Carolina. He was what is called in the trade a pulpwood producer and he owned his equipment and employed three laborers. *Miles v. West Virginia Pulp & Paper Co.*, 212 S. C. 424, 48 S. E. (2d) 26. Operating his truck in North Carolina he was in a fatal accident and his dependents filed claim for workmen's compensation.

The corporation was not exempt from the compensation law of North Carolina and operated under it there. Its insurance carrier was the other respondent here. The latter also insured the compensation liability of several allied corporations. *Without the knowledge of Cape Fear* the insurance carrier filed a workmen's compensation policy (called a "master policy") with the South Carolina Commission which purported to insure Cape Fear Wood Corporation, Cherokee Timber Corporation, Pineland Trading Corporation, Seaboard Trading Corporation and Acme Wood Corporation. (At least some of these corporations, other than Cape Fear, did business in this State and were, or had elected to come, under our workmen's compensation law. There had been no prior claim in this State against Cape Fear for workmen's compensation.) It is this single circumstance which appellants contend evidenced the intention of Cape Fear to elect to come under the compensation law pursuant to the terms

of Code Sec. 72-109, quoted above. There was no other evidence which indicated such intention of Cape Fear, which it denies.

We have held that substantial compliance with the statute is sufficient to bring an exempt employer within the terms of the compensation law. *Yeomans v. Anheuser-Busch*, 198 S. C. 65, 15 S. E. (2d) 833, 136 A. L. R. 894.

Mere statement of the foregoing facts is sufficient to 1, 2 show that the case in hand is far afield of the statute and does not come within the rule of the *Yeomans* case. Rather it falls within *Carter v. Associated Petroleum Carriers*, 235 S. C. 80, 110 S. E. (2d) 8, and the Industrial Commission properly held, affirmed by the lower court, that it had no jurisdiction of the claim. A casual reading of the cited decisions is conclusive. The following excerpts from the opinion in the *Yeomans* case show the vital differences in the facts of that case, which is relied upon by appellants, and this [198 S. C. 65, 15 S. E. (2d) 834]:

"Some months prior to the accident * * * there was filed with an agency of the Commission a notice that the employer had procured a policy of insurance from the carrier * * * endorsed to the effect that it was applicable and in force in South Carolina under the terms of our Compensation Act, and containing provisions in compliance with Section 71 of the Act making it a direct obligation from the carrier to the respondent employee. Thereupon two copies of a form letter (with explanation that the second copy was for the carrier) were forwarded by the Commission to the employer whereby receipt was acknowledged of the proof of insurance and ~~that~~ it had been filed, reciting the policy number, assigning code numbers to the employer and carrier and instructing with respect to the report of accidents, etc. There was no evidence of reply to this letter or other action thereabout, although it was stamped as received by the employer on April 13, 1939. * * * In addition to the facts above mentioned, there is in the record only the testi-

mony by deposition taken in St. Louis of the insurance manager of the employer who testified as to the number of employees in South Carolina and that their 'salary and wages are allocated to the State of South Carolina for the computation of Workmen's Compensation insurance premiums.' There was no testimony from him, except proper inferences from his evidence just quoted, or any other witness as to the intention and desire of the employer with respect to election to come within the terms of the Compensation Law. Thus we have a record which contains evidence all one way (except the bald failure of the employer to file formal notice under 5(b), tending to establish that the employer did desire to become subject to the Act."

Affirmed.

TAYLOR, OXNER, LEGGE and MOSS, JJ., concur.

17733

Robert S. TOVEY *et al.*, in their own behalf and others similarly situated, Appellants, v. CITY OF CHARLESTON, City Council of Charleston and J. Palmer Gaillard, Mayor of the City of Charleston, Respondents. Milton F. NELSON *et al.*, in their own behalf and others similarly situated, Appellants, v. CITY OF CHARLESTON, City Council of Charleston, and J. Palmer Gaillard, Mayor of the City of Charleston, Respondents.

(117 S. E. (2d) 872)

Consolidated actions challenging annexation of territory to city. The Common Pleas Court, Charleston County, Thomas P. Bussey, J., dismissed the complaints, and an appeal was taken. The Supreme Court, Oxner, J., held, *inter alia*, that public service district was not a "municipal corporation" within contemplation of annexation statute, and that annexation of portion thereof to city was not invalid even though question of annexation was submitted to voters of only those portions of district which were proposed to be annexed.

Affirmed.

1. MUNICIPAL CORPORATIONS.—The term “municipal corporation” ordinarily applies to incorporated cities, towns and villages having subordinate and local powers of legislation, but at times the term is used in a broader sense to include every corporation formed for governmental purposes, so as to embrace counties, townships, school districts and other governmental subdivisions of state.

See publication Words and Phrases, for other judicial constructions and definitions of “Municipal Corporation”.

2. MUNICIPAL CORPORATIONS.—Public service district was not a “municipal corporation”, within contemplation of annexation statute, and annexation of portion thereof to city was not invalid even though question of annexation was submitted to voters of only those portions of district which were proposed to be annexed. Code 1952, §§ 47-11 to 47-24, 47-23; Act June 17, 1949, 46 St. at Large, p. 1015.
3. MUNICIPAL CORPORATIONS.—There is no statutory or constitutional prohibition against annexation by city of territory lying within governmental subdivision organized for special purpose, and city could validly annex a portion of a public service district. Code 1952, § 47-17.
4. MUNICIPAL CORPORATIONS.—Annexation was not invalidated by reason of fact that city had initiated and partly financed circulation of petition by freeholders asking that an election be held on question of annexation. Code 1952, § 47-17.
5. MUNICIPAL CORPORATIONS.—Marshlands can be made part of town or city; and fact that marshlands might be owned by state would not prevent annexation thereof to city. Code 1952, § 47-17.
6. MUNICIPAL CORPORATIONS.—Annexation statute limits neither extent nor shape of territory which may be annexed, and matter is left to determination of voters of municipality and territory proposed to be annexed. Code 1952, § 47-17.
7. MUNICIPAL CORPORATIONS.—Mere irregularity in shape furnished no justification for interference by courts in determination of voters that annexation was to best interests of both municipality and area to be annexed. Code 1952, § 47-17.
8. MUNICIPAL CORPORATIONS.—Fact that annexed areas were separated from city by navigable stream did not break contiguity or invalidate annexation where there was in fact no intervening space between annexed areas and former city boundaries and, since river was spanned by excellent bridge, there was no reason why two areas could not make homogeneous city. Code 1952, § 47-13.
9. MUNICIPAL CORPORATIONS.—Where inhabitants of two separate territories seek annexation to municipality, they may simultaneously commence annexation proceedings, and it is sufficient if at time

such areas are annexed all are contiguous to each other and that one of them is contiguous to or adjoins city. Code 1952, § 47-13.

10. MUNICIPAL CORPORATIONS.—That one of areas to be annexed was separated from city by another area, to be annexed, and that if election relating to attachment of latter area was not favorable first area could not, because of lack of contiguity, be annexed, did not require that proceedings for annexation of first area await annexation of latter area.

Paul H. Lee, Jr., Esq., of Charleston, for Appellants, cites: As to St. Andrew's Public Service District being a Municipal Corporation: 37 Am. Jur. 617, 619, Sec. 3; Dillon, Municipal Corporations (5th) Ed., Vol. 1, Sec. 31 (19); McQuillin Municipal Corporations (2nd) Ed., Revised Vol. 1, Sec. 126 (107); 82 S. C. 284, 64 S. E. 151; 232 S. C. 515, 103 S. E. (2d) 14; 139 S. C. 188, 137 S. E. 597. As to effect of failure to submit the question of detachment to the voters of St. Andrew's Public Service District: 224 S. C. 166, 77 S. E. (2d) 900. As to the St. Andrew's Public Service District being a political subdivision and an organized area of the State of South Carolina having designated limits and boundaries at the time of the purported annexation: 109 S. E. (2d) 354. As to the Respondents being without authority to annex a portion of such District: 77 S. E. (2d) 900. As to Areas A and C not being subject to annexation by the City of Charleston, in view of the location of the Ashley River: 302 U. S. 385; 374 Pa. 546, 98 A. (2d) 34. As to the resulting alleged new boundaries of the City being so irregular as to render the annexation void: 62 C. J. S. 144, Anno.; (S. D.) 24 N. W. (2d) 919. As to Area C not being adjacent or contiguous to the Respondent City on the date of the election: 255 Ill. 190, Ann. Cas. 1913 D, 399; 52 N. D. 351, 202 N. W. 807; 37 Am. Jur. 644, 645, Sec. 27.

Messrs. Morris D. Rosen, Henry B. Smythe and J. Kenneth Rentiers, of Charleston, for Respondents, cite: As to special purpose districts and the extent of their functions: 214 S. C. 451, 53 S. E. (2d) 316; 211 S. C. 77, 44 S. E. (2d) 88; 137 S. C. 496, 135 S. E. 538. As to the areas

being annexable to the City of Charleston: 221 S. C. 438, 71 S. E. (2d) 1; 249 N. C. 46, 105 S. E. (2d) 411; 193 Va. 82, 68 S. E. (2d) 101; 128 F. Supp. 717; 145 Tex. 443, 193 S. W. (2d) 450. *As to lands on opposite sides of a river from a city being contiguous to it within the meaning of the statutes concerning the extension of city limits:* 2 McQuillin, Municipal Corporations (3rd Ed.), 312; 37 Am. Jur. 645; 54 Ark. 321, 15 S. W. 891, 16 S. W. 291; 133 Md. 247, 104 A. 540; 54 Ark. 335, 15 S. W. 836, aff'd 55 Ark. 609, 19 S. W. 13; 110 Ohio St. 96; 224 Ark. 215, 272 S. W. (2d) 442. *As to the question of the marshlands:* 2 McQuillin, Municipal Corporations, p. 307. *As to the present new boundaries of the City of Charleston not being so irregular as to render the annexation void:* 234 S. C. 172, 107 S. E. (2d) 33. *As to Sections 47-16 and 47-17 of the Code of Laws of South Carolina for 1952 being complied with, inasmuch as Area C was adjacent to Area A, which was adjacent to the City of Charleston, and both were declared a part of and annexed to the City of Charleston by resolution of the City Council of Charleston at the same time:* 104 A. 540; 77 S. C. 107, 49 S. E. (2d) 1; 62 A. L. R. 1011, 1016; 37 Am. Jur. 645; McQuillin, Municipal Corporations (3rd. Ed.) 312; 62 C. J. S. 135; 98 A. (2d) 33; 21 A. 978; 108 Ind. 14, 8 N. E. 701; 62 N. E. 525; 87 Ind. 45; 145 N. E. (2d) 257.

January 10, 1961.

OXNER, Justice.

This litigation stems from an effort to extend the corporate limits of Charleston, the State's oldest and most historic city. There has been no change in its boundaries since 1849.

It was sought to annex certain areas designated as "A", "B", "C", "E" and "F", all of which are within St. Andrews Public Service District. A petition was duly submitted to the City Council of Charleston by a majority of the freeholders of each area asking that an election be ordered on

the question of annexing such area. A special election was held on May 9, 1960 in which the qualified electors of the City of Charleston and the qualified electors of each area voted on the question of whether such area should be annexed. To extend the corporate limits of a municipality, it is necessary under the statute that "a majority of the votes cast by the qualified electors of the municipality and of the territory proposed to be annexed, each aggregated separately," be in favor of the annexation. Section 47-17 of the 1952 Code. Although not disclosed by the record, it was stated in oral argument that the elections in areas "B" "D", "E" and "F" resulted unfavorably to annexation. The vote as to areas "A" and "C" was favorable. Thereafter on May 16, 1960, these two areas were declared by the City Council of Charleston to be a part of said municipality. Due notice was given of an intention to contest each annexation. Thereafter on August 8, 1960 an action was brought by certain qualified electors and taxpayers of area "A", seeking to have the annexation of said territory declared null, void and of no effect and to enjoin the City Council of Charleston from exercising any authority with respect thereto. On the same day a similar action was brought by certain qualified electors and taxpayers of area "C". The two cases were consolidated and heard by the resident Judge of the Ninth Circuit on August 24, 1960. In an order filed on September 3, 1960, he held that each of these areas was properly annexed to the City of Charleston and dismissed the complaints. This appeal followed.

In their first ground of attack upon the validity of 1, 2 the annexation, appellants contend that the St. Andrews Public Service District is a municipal corporation, and that therefore no part of it may be attached to another municipality without submitting the question to all the voters in the district. We have held that under our statutes governing extension and reduction of corporate limits, a portion of one municipality may not be annexed to another without submitting the question of said detachment

to the voters of the municipality whose area is to be reduced. *Town of Forest Acres v. Seigler*, 224 S. C. 166, 77 S. E. (2d) 900; *Town of Forest Acres v. Town of Forest Lake*, 226 S. C. 349, 85 S. E. (2d) 192. It is conceded that the question of annexation was submitted to the voters of only those portions of St. Andrews Public Service District that were proposed to be annexed; that it was not submitted to the voters of the entire district; and that the corporate authorities of said district were never consulted. Therefore, the answer to the question presented depends upon whether this district is a municipal corporation within the contemplation of our annexation statute. It was created by Act No. 443 of the 1949 Acts of the General Assembly, 46 Stat. at Large 1015, and empowered to operate water and sanitary sewer systems, furnish fire protection facilities and provide garbage collection and disposal within the territory embraced in the district. It was authorized to make service charges for some of these facilities. Other funds necessary to carry out its corporate purposes and functions were to be raised by annual levy on all property in the district. Certain other duties and functions were given the district but the foregoing are sufficient to show its general nature and purpose.

The term "municipal corporation" ordinarily applies only to incorporated cities, towns and villages having subordinate and local powers of legislation. As stated in 1 Dillon, *Municipal Corporations*, 4th Edition, Section 19: "A municipal corporation, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purpose of local government thereof." However, at times the term is used in a broader sense to include every corporation formed for governmental purposes so as to embrace counties, townships, school districts and other governmental subdivision of the State. *Gaud v. Walker*, 214 S. C. 451, 53 S. E. (2d) 316.

It is true, as appellants argue, that special districts created for the purpose of furnishing water, sewerage, garbage collection, fire protection and other similar facilities, functions

usually performed by incorporated towns and cities, have been referred to in some of our cases as municipal corporations with limited functions and have been held to be municipal corporations within the meaning of certain sections of our Constitution. *Rutledge v. Greater Greenville Sewer District*, 139 S. C. 188, 137 S. E. 597; *Floyd v. Parker Water and Sewer Sub-district*, 203 S. C. 276, 17 S. E. (2d) 223; *Sanders v. Greater Greenville Sewer District*, 211 S. C. 141, 44 S. E. (2d) 185; *Mills Mill v. Hawkins*, 232 S. C. 515, 103 S. E. (2d) 14. But it does not follow that such special purpose districts are to be regarded as municipal corporations in the primary sense of the term so as to bring them within all of our statutes and constitutional provisions pertaining to incorporated towns and cities.

Turning now to our statute relating to the extension or reduction of the corporate limits of a municipality, Sections 47-11 to 47-24, inclusive, of the 1952 Code, it seems quite clear that this statute applies only to incorporated cities and towns. Section 47-11 reads: "Any city or town council may extend the corporate limits of such city or town in the manner set forth in this article." It is expressly stated in Section 47-24: "The word '*municipality*' as used in this article shall be construed to mean any incorporated city or town located within this State." Section 47-23 provides that "whenever a petition is presented to a city or town council" by a majority for the freeholders residing therein asking for a reduction of the corporate limits, an election shall be ordered and if a majority of the qualified electors vote in favor of the release of the territory, "then the council shall issue an ordinance declaring the territory no longer a portion of the city or town." Clearly "city or town council" referred to in this statute means the corporate authorities of an incorporated town or city.

It is further contended that even if this district is
3 not a municipal corporation within the meaning of our annexation statute, it is corporate territory organized under an act of the General Assembly whose area cannot be

reduced nor its boundaries changed by annexing a part of it to an adjacent city or town. We have no statute or constitutional provision prohibiting a city from annexing territory lying within a governmental subdivision organized for a special purpose and we have found no decision holding that such territory may not be annexed. *Town of Forest Acres v. Seigler, supra*, 224 S. C. 166, 77 S. E. (2d) 900, cited by appellants, is not apposite for it was there sought to annex a portion of a municipality. In *Wagener v. Smith*, 221 S. C. 438, 71 S. E. (2d) 1, we held that the fact that the Legislature had established a township form of government for a certain area with powers similar to those devolved upon towns of similar size did not prevent the inhabitants of said area from thereafter incorporating same as a town under the general law. It would seem that under this decision the establishment of a special purpose district would not prevent an adjacent city from later annexing a part thereof. In some areas of the State there are overlapping special purpose districts. Some of them extend into incorporated towns and cities. Most of our large municipalities are surrounded by such districts. It has never been suggested that this would prevent such municipalities from extending their corporate limits.

In *State ex rel. East Lenoir Sanitary Dist. v. City of Lenoir*, 249 N. C. 96, 105 S. E. (2d) 411, the Supreme Court, of North Carolina held that the City of Lenoir was authorized to extend its boundaries so as to include a portion of the area of a sanitary district. In *Annexation to the City of Anchorage, etc.*, 15 Alaska 67, 128 F. Supp. 717, it was held that the extension of the corporate limits of a municipality is not prohibited merely because the area sought to be annexed constitutes a part of the territory organized as a public utility district. Also, see *Fairfax County v. City of Alexandria*, 193 Va. 82, 68 S. E. (2d) 101.

It is next contended that the annexation should be
4 declared null and void because the City initiated and partly financed the circulation of the petition by the

freeholders asking that an election be held on the question of annexation. We find nothing in the statute prohibiting such activities.

It is claimed that 321 acres of marshlands owned by
5 the State were included in area "A" which rendered the annexation of that area invalid. No authority has been cited, and we know of none, holding that marshlands cannot be made a part of a town or city. The record does not disclose the owner of this property but the fact that it may be owned by the State would not prevent its annexation to the City of Charleston. *Howard v. Commissioners of Sinking Fund*, 344 U. S. 624, 73 S. Ct. 465, 97 L. Ed. 617. It was there held that the City of Louisville, Kentucky, had the power to annex certain federally owned land upon which was located a naval ordinance plant. The following is from 62 C. J. S. Municipal Corporations § 46, p. 133: "State property may be included in territory annexed to a municipality, as may be territory under exclusive jurisdiction of the federal government."

An attack is made upon the shape of the city if the
6, 7 annexation is permitted to stand. It is said that it would be "so extraordinarily irregular in shape and boundaries" as to preclude that "compactness and unity" required of a municipal corporation. The boundaries of Charleston have always been irregular in shape and necessarily so. Prior to the present annexation, it was a peninsula, bounded on the east by the Cooper River and on the west by the Ashley River. The confluence of these rivers at the south end of the city form Charleston Harbor. Without crossing one of them, extension can only be made to the north. The annexed territory consists of a tract of land about one mile in width extending westerly from the Ashley River a distance of approximately four miles. It is bounded on the north by U. S. Route 17. Area "A" is bounded by the Ashley River on the east and Area "C" on the west.

There is no limitation in our annexation statute as to the extent or shape of the territory which may be annexed and

there is nothing from which any such limitation may be implied. It is a matter left to the determination of the voters of the municipality and the territory proposed to be annexed. There is on charge in this case of fraud or a denial of any constitutional right. A bridge on Route 17 across the Ashley River makes the annexed area readily accessible to the old city. There is no proof that this annexation would cause any difficulties in the administration of the affairs of the city or result in any undue hardship to any citizen. Mere irregularity in shape furnishes no justification for interference by the courts in the determination by the voters that an annexation is to the best interest of both the municipality and the area to be annexed. *City of Burlingame v. San Mateo County*, 90 Cal. App. (2d) 705, 203 P. (2d) 807. *Cp. Bellamy v. Johnson*, 234 S. C. 172, 107 S. E. (2d) 33.

The remaining exceptions relate to contiguity. The
8 statutes of many States require that the land annexed be contiguous or adjacent to the municipal borders. Appellants say that the reference in Section 47-13 of our annexation statute to "adjacent territory" necessarily implies such requirement. Whether this be true or not, it seems to be generally recognized, and is so conceded in this case, that there must be contiguity even in the absence of a statutory requirement to that effect. *McGraw v. Merryman*, 133 Md. 247, 104 A. 540; 37 Am. Jur., Municipal Corporations, Section 27; 62 C. J. S., Municipal Corporations, § 46c. Such is ordinarily essential to make the city a collective body having unity and compactness.

Appellants argue that there is a lack of contiguity in two respects.

First, it is said that contiguity between the boundaries of the old city and area "A" is broken by the Ashley River. The channel of this river was formerly the western boundary of Charleston. The plat of the annexed territory introduced in evidence shows area "A" as extending to the eastern bank of the Ashley River. There is, therefore, no intervening space between the annexed areas and the former

city boundaries. We do not think the fact that they are separated by a navigable stream breaks the contiguity. *Vestal v. City of Little Rock*, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778; *McGraw v. Merryman*, *supra*, 133 Md. 247, 104 A. 540; *State ex inf. Taylor, ex rel. Kansas City v. North Kansas City*, 360 Mo. 374, 228 S. W. (2d) 762. As heretofore pointed out, this river is spanned by an excellent bridge and there is no reason why the two areas cannot make a homogeneous city which will afford to its several parts the ordinary benefits of local government. The river does not constitute a barrier to complete amalgamation of the communities upon its opposite banks. *Ocean Beach Heights v. Brown-Crummer Investment Co.*, 302 U. S. 614, 58 S. Ct. 385, 82 L. Ed. 478, cited by appellants, is distinguishable on the facts. There it was sought to incorporate two areas separated by a bay about a half-mile in width which was not spanned by a bridge. The distance between the two areas by land was about ten miles, and to go by land from one to another, it was necessary to pass through another municipality. It was held that the two areas were not contiguous.

Secondly, it is contended that at the time of the 9, 10 election area "C" was not contiguous because it was separated from the city by area "A". It is argued that proceedings for annexation of area "C" could not be lawfully commenced until after area "A" had been made a part of the municipality. We do not agree with this view. All that the statute requires is that a petition for an election be filed by a majority of the freeholders in the area proposed to be annexed followed by a favorable vote both there and in the municipality. These requirements have been met both as to "A" and "C". It is true that if the election relating to the attachment of area "A" had not been favorable, area "C" could not have been annexed because there would have been a lack of contiguity between it and the City. Both elections resulted favorably to annexation and the two areas were simultaneously declared parts of the City of Charleston. There

was never a moment of time when there was lack of contiguity between the City and the entire area which was annexed. Where the inhabitants of two separate territories seek annexation to a municipality, there is nothing in our statute prohibiting them from simultaneously commencing annexation proceedings. It is sufficient if at the time such areas are annexed, all are contiguous to each other, and one of them is contiguous to or adjoins the city.

While we have found no decision in this State on the question, it seems to be well settled elsewhere that contiguity does not require that each of the several tracts annexed be individually contiguous to the city, so long as the several tracts are themselves contiguous and one of them adjoins the city boundaries. *Hurla v. City of Kansas City*, 46 Kan. 738, 27 P. 143; *The City of Evansville v. Page*, 23 Ind. 525; *In re Sadler*, 142 Pa. 511, 21 A. 978; *Huff v. City of La Fayette*, 108 Ind. 14, 8 N. E. 701; *In re Westmoreland, Inc.*, 15 Ill. App. (2d) 51, 145 N. E. (2d) 257; *In re Lancaster City Ordinance No. 20-1952*, 374 Pa. 543, 98 A. (2d) 33; Annotation 62 A. L. R., at page 1016.

None of the foregoing cases recognize the distinction now sought to be made by appellants. On the contrary, in most of them contiguous tracts, only one of which was adjacent to the municipality, were annexed at the same time. In *City of Evansville v. Page*, *supra*, one of the headnotes is as follows: "Where several pieces of platted territory do not all adjoin a city, but adjoin one another, and one of them adjoins a city, they may all be annexed at the same time." In *Huff v. City of La Fayette*, *supra*, the Court said [108 Ind. 14, 8 N. E. 703]: "It was not necessary that appellant's lands should have been contiguous to the city. If his, and the other tracts of land proposed to be annexed, were contiguous to each other, and one of them was contiguous to the city, that was sufficient."

All exceptions are overruled; the annexations are adjudged to be valid; and the order of the Circuit Court is affirmed.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

17735

Carl W. MULLIS, Respondent, v. Annie Burns WINCHESTER *et al.*,
Appellants
(118 S. E. (2d) 61)

Adverse possession case. The Common Pleas Court of Lancaster County, George T. Gregory, Jr., J., granted judgment for plaintiff notwithstanding verdict for defendants. The defendants appealed. The Supreme Court, Moss, J., held that evidence established plaintiff's title by adverse possession.

Affirmed.

1. ADVERSE POSSESSION.—Adverse possession must be actual, open, notorious, hostile, continuous and exclusive for entire statutory period. Code 1952, §§ 10-2422, 10-2423 (1-4).
2. ADVERSE POSSESSION.—Party relying on adverse possession has burden of proof.
3. ADVERSE POSSESSION.—Ordinarily, adverse possession is question of fact for jury and becomes question of law only when evidence is undisputed and susceptible of but one inference.
4. APPEAL AND ERROR.—The Supreme Court, on appeal in adverse possession case, limits factual review to whether any evidence reasonably sustained verdict in trial court.
5. ADVERSE POSSESSION.—Deed minutely and definitely describing tract conveyed by purchaser at invalid tax sale to grantees claiming title by adverse possession was "color of title".
See publication Words and Phrases, for other judicial constructions and definitions of "Color of Title".
6. ADVERSE POSSESSION.—The actual possession of portion of property by one entering upon land under color of title will be constructively extended to boundaries defined by color of title.
7. ADVERSE POSSESSION.—Evidence established plaintiff's title by adverse possession in that plaintiff made hostile entry under color of title and openly, notoriously, visibly and exclusively occupied land for statutory period to obtain timber therefrom and to grow timber thereon. Code 1952, §§ 10-2422, 10-2423 (1-4).
8. ADVERSE POSSESSION.—Interruption of possession relied on to establish title by adverse possession restores constructive possession of owner.
9. ADVERSE POSSESSION.—The nature and location of land should be considered in determining whether possession relied on to establish

title by adverse possession has been interrupted and whether use to which land has been put comports with usual management of such property.

10. ADVERSE POSSESSION.—Acts of adverse possession, or acts of ownership, with regard to open, wild, unfenced lands, lands not capable of cultivation are only required to be exercised in such way as is consistent with use to which lands may be put and situation of property admits of without actual residence or occupancy.
11. ADVERSE POSSESSION.—The relation which party claiming adverse possession occupies with reference to owner is considered in determining whether possession is hostile.
12. QUIETING TITLE.—Action to remove cloud on and quiet title cannot be maintained by one not in possession of land when action is instituted.

Messrs. Bell & Bell, of Lancaster, and *Henry Hall Wilson*, of Monroe, N. C., for *Appellants*, cite: *As to the elements of adverse possession*: 162 S. C. 177, 160 S. E. 436; 222 S. C. 186, 72 S. E. (2d) 165. *As to error on part of trial Judge in granting Respondent's motion for judgment non obstante veredicto*: 196 S. C. 173, 12 S. E. (2d) 712; 222 S. C. 93, 71 S. E. (2d) 893; 121 S. C. 237, 113 S. E. 688; 175 S. C. 254, 178 S. E. 819; 95 S. C. 120, 78 S. E. 741; 155 S. E. 149, 158 S. C. 21, 81 A. L. R. 196; 109 S. E. 102, 117 S. C. 291; 108 S. E. (2d) 86, 234 S. C. 291; 80 S. E. (2d) 740, 225 S. C. 52; 53 S. C. 216, 31 S. E. 231; 6 Rich. 62; 1 McMul. 354; 137 S. C. 468, 135 S. E. 567; 225 F. 645; 11 S. C. L. (2 Nott & McC.) 343; Rice 10; 114 S. C. 452, 103 S. E. 779; 224 S. C. 452, 79 S. E. (2d) 871; 170 A. L. R. 915, 925, 926; 170 A. L. R. 923; 2 C. J. S., Adverse Possession, Sec. 20, p. 535; 94 S. C. 71, 78 S. E. 706; 2 C. J. S., Adverse Possession, Sec. 19, p. 533; 209 S. C. 112, 39 S. E. (2d) 292; 82 S. C. 358, 64 S. E. 165. "

Messrs. Richards, Caskey & Richards, of Lancaster, for *Respondents*, cite: *As to questions, not raised below, not being entitled to consideration by Appellate Court*: 34 S. E. (2d) 51, 206 S. C. 307; 21 S. E. (2d) 209, 201 S. C. 32; 10 S. E. (2d) 305, 195 S. C. 213. *As to Respondent having established his claim to the land by adverse possession*: 126

Va. 223; 123 S. C. 61, 115 S. E. 727; 1 Am. Jur. 874; 170 A. L. R. 915; 85 Miss. 277, 37 So. 839; 2 Coldw. (Tenn.) 64; 119 Miss. 564, 81 So. 839; 1 Am. Jur. 867, 868; (S. C.) 153 S. E. 286; 1 Am. Jur. 867.

January 12, 1961.

Moss, Justice.

Carl W. Mullis, the respondent herein, instituted this action on March 21, 1957, pursuant to Sections 65-3301 - 65-3306, of the 1952 Code of Laws of South Carolina, to remove a cloud on and quiet title to a tract of land, described in the complaint as containing 310 acres, more or less. The pleadings admit that prior to September 17, 1931, E. C. Winchester had a good fee simple title to this tract of land and that on said date he conveyed same to one R. H. Burns. The said deed is of record in the office of the Clerk of Court for Lancaster County, South Carolina, in Deed Book D, at page 36. It further appears that E. C. Winchester died intestate in the year 1936 and that R. H. Burns died testate. The appellants in this action are either the heirs at law of E. C. Winchester or the devisees of R. H. Burns. It also appears that the taxes on the aforesaid tract of land were not paid and that the sheriff of Lancaster County, South Carolina, pursuant to a tax execution, issued against Mrs. E. C. Winchester, levied upon and sold the said tract of land to one John S. Chonis. The defaulting taxpayer having failed to redeem said real estate, the sheriff of Lancaster County conveyed the said tract to John S. Chonis, which said deed is of record in the Clerk of Court's office for Lancaster County, South Carolina, in Deed Book I-3, at page 168. It further appears that John S. Chonis did, by deed dated December 14, 1943, for a consideration of \$8,500.00, convey the said 310 acre tract to Carl W. Mullis, the respondent herein, and this deed was recorded in the office of the Clerk of Court for Lancaster County, South Carolina, on January 3, 1944, in Deed Book J-3, at page 445. The complaint also alleges that the respondent had been in actual, open, hostile, con-

tinuous, exclusive and notorious possession of the said tract of land since December 14, 1943, when he purchased same as aforesaid. The answer of the appellants, in so far as this appeal is concerned, denied the allegation of adverse possession contained in the complaint.

This case came on for trial before the Honorable George T. Gregory, Jr., Judge of the Sixth Circuit, and a jury, on May 12, 1958. It was stipulated that the respondent relied entirely upon adverse possession under color of title. It was further admitted that the tax deed heretofore referred to was invalid. It was agreed also that the only issue for trial was the question of whether the respondent had acquired title to the property in question by adverse possession.

At the close of the testimony in behalf of the respondent, the appellants made a motion for a nonsuit, which motion was refused by the trial Judge. Thereafter, the appellants announced that they would present no testimony in their behalf. The respondent and the appellants then made a motion for a directed verdict, which said motions were refused. The Court submitted to the jury the single question of whether the respondent acquired title to the aforesaid tract of land by exercising actual, open, notorious, hostile and adverse possession of said property, exclusively and continuously for a period of ten years or more, prior to the commencement of the action. The jury answered this question in favor of the appellants. Thereupon, the respondent moved for judgment *non obstante veredicto* and on January 18, 1960, by order, the motion was granted, and it was adjudged that the respondent had acquired title to the subject premises by adverse possession. The sole question for determination upon this appeal is whether the respondent established title to the property in question by adverse possession. This question, of course, embraces the further question of whether there was error on the part of the trial Judge in setting aside the verdict of the jury, which was in favor of the appellants, and granting a judgment in favor of the respondent *non obstante veredicto*.

In order to constitute adverse possession, which results in obtaining title to property, the possession must be actual, open, notorious, hostile, continuous and exclusive for the whole statutory period. It may be stated as a general rule that claimant's possession must be such as to indicate his exclusive ownership of the property. Not only must his possession be without subserviency to, or recognition of, the title of the true owner, but it must be hostile thereto and to the whole world. 1 Am. Jur., Adverse Possession, Section 130. *Gregg et al. v. Moore*, 226 S. C. 366, 85 S. E. (2d) 279; and *Lynch v. Lynch*, 236 S. C. 612, 115 S. E. (2d) 301.

The respondent alleged in his complaint that he acquired title to the premises in question by adverse possession. We have held in numerous cases that the burden of proof of adverse possession is on the party relying thereon. *Lynch v. Lynch*, *supra*. We have also held that ordinarily the question of adverse possession is one of fact for the jury and only becomes one of law for the Court when the evidence is undisputed and susceptible of but one inference. *McIntosh et al. v. Kolb et al.*, 112 S. C. 1, 99 S. E. 356; *Atlantic Coast Line R. Co. v. Searson*, 137 S. C. 468, 135 S. E. 567; and *Lynch v. Lynch*, *supra*.

The issue of title by adverse possession being one of law, our factual review of it is limited to determination of whether there was any evidence reasonably sustaining the verdict in the lower Court. *Fogle v. Void*, 223 S. C. 83, 74 S. E. (2d) 358; *Phillips v. DuBose*, 223 S. C. 224, 75 S. E. (2d) 56; and *Seagle et al. v. Montgomery et al.*, 227 S. C. 436, 88 S. E. (2d) 357.

The deed of John Chonis to the respondent constituted color of title. This deed contains a minute and definite description of the 310 acre tract of land and there is no doubt as to the identity of the tract of land conveyed. In the case of *Graniteville Co. v. Williams et al.*, 209 S. C. 112, 39 S. E. (2d) 202, 207, it was said:

"Color of title means 'any semblance of title by which the extent of a man's possession can be ascertained'. *Turpin v. Brannon*, 3 McCord, 261. It 'is anything which shows the extent of occupant's claim'. *Sprott et al. v. Sprott et al.*, 114 S. C. 62, 96 S. E. 617. 'The object of color of title is not to pass title. In that case it would be title, not color of title. The only office of color of title is to define the extent of the claim and to extend the possession beyond the actual occupancy to the whole property described in the paper. * * * It is by no means necessary that the paper should be in the form of a deed. A bond or even a receipt would be sufficient'. *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706, 709, Ann. Cas. 1915A, 955. Also, see *Gray v. Bates*, 3 Strob. 498. Manifestly, an instrument in order to constitute color of title need not be valid as a muniment of title. The extent of the occupant's claim founded on an instrument of writing is not dependent upon the validity of such instrument. *Fradley v. Ivester*, 129 S. C. 536, 125 S. E. 134. A deed may be color of title although the grantor was without interest or title in the land conveyed. 'There is a material difference between proving a deed as a part of a chain of title and introducing a paper to show the extent of the party's possession'. *Kennedy v. Kennedy*, 86 S. C. 483, 68 S. E. 664, 669."

Hence, when one enters upon land, under color of
6 title, his actual possession of a portion of the property will be constructively extended to the boundaries defined by his color of title. *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727; *Kennedy v. Kennedy*, 86 S. C. 483, 68 S. E. 664.

It is provided in Section 10-2422, of the 1952 Code of Laws, as follows:

"Whenever it shall appear (1) that the occupant or those under whom he claims entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question or upon the decree of

judgment of a competent court and (2) that there has been a continued occupation and possession of the premises, or of some part of such premises, included in such instrument, decree or judgment under such claim for ten years, the premises so included shall be deemed to have been held adversely, except that when the premises so included consist of a tract divided into lots the possession of one lot shall not be deemed a possession of any other lot of the same tract."

Section 10-2423 of the 1952 Code of Laws, provides:

"For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

"(1) When it has been usually cultivated or improved;

"(2) When it has been protected by a substantial enclosure;

"(3) When, although not enclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry or for the ordinary use of the occupant; and

"(4) When a known farm or a single lot has been partly improved the portion of such farm or lot that may have been left not cleared or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

Carl W. Mullis, the respondent herein, owns and operates the Mullis Lumber Company in Lancaster, South Carolina. It was testified that in the course of his business he purchased tracts of land in order to get the timber therefrom and for the future cutting of timber growth thereon. It was further testified that of all the numerous tracts of land purchased by the respondent, all were bought for the purpose of cutting timber therefrom and growing timber thereon, and as to the tract of land here involved, it was used solely for that purpose. The respondent testified

that in 1943 when he purchased the 310 acre tract of land, which was during the second World War, he was selling lumber to the government and was trying to keep up his timber reserves by buying as much timber as he was cutting. He found out that the tract of land here involved was for sale and he had the timber thereon cruised and, thereafter, John Chonis was contacted and the respondent succeeded in buying the tract of land from him for \$8,500.00. Chonis executed and delivered to the respondent a deed for said tract of land. Shortly thereafter, Mrs. E. C. Winchester, one of the appellants, was contacted by a representative of the respondent and she was advised that the respondent had purchased the land and desired to obtain from her the plat thereof which was in her possession. She delivered the plat to a representative of the respondent for \$10.00. She did not claim that she and the other appellants owned this tract of land at such time. It then appears that the respondent, with the help of the adjoining landowners, had this tract of land surveyed. Thereafter, the time of which is not definitely fixed in the testimony, the respondent cut all merchantable timber thereon. He cut trees with a diameter greater than ten to twelve inches. The cutting was done by a crew of eight to ten men and the timber cut from said tract was hauled therefrom by three trucks which used woods roads upon said land. The testimony is undisputed that the respondent cut all of the merchantable timber up to the full extent of the boundaries of said tract of land. It was further testified that the best use of this land was for growing timber. The testimony is undisputed that the respondent followed the same cutting practice on this tract as he did on other similar tracts of land owned by him. He testified that he cut infrequently because he considered it good forestry practice to cut only the larger trees. There is testimony that there was a second cutting of timber from this tract of land but such took place after the institution of this action. An estimate of the timber cut from the premises ranges from two hundred thousand to one-half million feet. The testimony is undisputed that the respondent

paid all taxes, in his own name, levied and assessed by the County of Lancaster against this tract of land from the year 1944 until the trial of this case. Adjoining landowners and people living in the community testified in behalf of the respondent and corroborated his testimony of the adverse nature of his possession. They also testified that the people in the community considered the property as belonging to the respondent. They testified as to helping the respondent survey the tract of land in question. These same witnesses testified that the tract in question consisted of hilly land and timber growing was the best use to which it could be put. There is testimony that the limbs and tree tops, where such could be done, were sold as pulp wood. All of the foregoing testimony is undisputed, the appellants having offered no evidence.

It is the position of the appellants that the testimony relied on to establish adverse possession proves no continuous use or acts of trespass but only occasional cutting of timber and they assert that this is not sufficient to establish the requisite continuity of possession.

It is true that possession of land to give title by adverse possession must be continuous for the statutory period of ten years. *Glenn v. Walker*, 113 S. C. 1, 100 S. E. 706. In the case of *Cathcart v. Matthews et al.*, 105 S. C. 329, 89 S. E. 1021, 1025, this Court said:

“The rule requiring continuity of possession does not mean that the person in possession, his tenant or agent, must be actually on the land during the whole of the statutory period. Actual possession, once taken, will continue, though the party taking such possession should not continue to rest with his foot upon the soil, until he be disseised, or until he do some act which amounts to a voluntary abandonment of the possession. *Grimke v. Brandon* [10 S. C. L.], 1 Nott & McC. 356; *Cleveland v. Jones*, reported in a note in [34 S. C. L.], 3 Strob. 479; *Wilson v. McLenaghan* [16 S. C. Eq.], McMul. Eq. 35; *Mahoney v. [Southern] Ry.*, [82 S. C. 215, 64 S. E. 228]. * * *”

It is, of course, the general rule that in order for 8, 9 adverse possession to ripen into title, it must be continuous and uninterrupted for the full statutory period. The moment the possession is broken it ceases to be effectual because the law immediately restores the constructive possession of the owner. But in determining when possession is broken, the nature and location of the land should be considered and whether the use to which the same has been put comports with the usual management of such property. 76 A. L. R., at page 1492.

It has been held that occasional entries on land to cut a small amount of timber do not constitute a sufficiently continuous use to establish adverse possession. Such was the case of *Bailey et al. v. Irby et al.*, 11 S. C. L. (2 Nott & McC.) 343, where it was held that there was no continuity of possession "with him who enters only occasionally; he commits a petty trespass and disappears without scarcely leaving a mark behind", or where "it may be done so secretly as to elude detection; and it would be monstrous to allow one man to filch away the land of his neighbor without the possibility of guarding himself against it."

Acts of adverse possession, or acts of ownership, with 10 regard to open, wild, unfenced lands, lands not capable of cultivation, are only required to be exercised in such way and in such manner as is consistent with the use to which the lands may be put and the situation of the property admits of without actual residence or occupancy. Cf. *D. W. Alderman & Sons Co. v. McKnight*, 95 S. C. 245, 78 S. E. 982.

In 1 Am. Jur., Adverse Possession, Section 131, at page 866, it is said:

"From what has been stated heretofore, it is evident that in determining what will amount to an actual possession of land, considerable importance must be attached to its nature and to the uses to which it can be applied, or to which the claimant may choose to apply it. What is adverse possession

is one thing in a populous country, another thing in a sparsely settled one, and still a different thing in a town or village. * * * As a general rule it will be sufficient if the land is so used by the adverse claimant as to apprise the community in its locality that it is in his exclusive use and enjoyment, and to put the owner on inquiry as to the nature and extent of the invasion of his rights; and this is especially true where the property is so situated as not to admit of permanent improvement. In such cases, if the possession comports with the usual management of similar lands by their owners, it will be sufficient. Neither actual occupation, cultivation, nor residence is necessary where neither the situation of the property nor the use to which it is adapted or applied admits of, or requires, such evidences of ownership."

In the case of *Neilson v. Haas*, La. App., 199 So. 202, 203, it was held that possession during which all merchantable timber is cut is notice to the world that the person in possession claims the land and has a right of possession.

We think the trial Judge was correct in concluding that the acts of adverse possession by the respondent were sufficient to establish requisite continuity of possession for the statutory period of ten years, particularly in view of the use to which this tract of land could be put and the situation of the property. The respondent entered upon this land under color of title and possessed and occupied same for his ordinary use in obtaining timber therefrom and growing timber thereon. Section 10-2423(3), 1952 Code of Laws of South Carolina.

We likewise think that the trial Judge was correct

11 in concluding that the only inference to be drawn from the testimony was that the respondent had made a hostile entry upon the lands in question. His occupation was open, notorious, visible and exclusive. In fact, one of the appellants was notified of the purchase of the land and made no claim of title thereto. In determining what amounts to hostility, the relation which the party claiming

adverse possession occupies with reference to the owner is important. As a general rule, the law presumes that the exclusive possession of land by one who is a stranger to the holder of the legal title is adverse. *Knight et al. v. Hilton et al.*, 224 S. C. 452, 79 S. E. (2d) 871. The respondent here was a stranger to the appellants in this case. There can be no question but what the respondent entered into possession of this land with the intention to dispossess the owners thereof.

As we stated in the beginning, this is a case to re-
12 move a cloud on and quiet title to the land in question. Such an action could not be maintained by the respondent if he were not in possession of the land at the time of the institution of the action. *Pollitzer v. Beinkempen*, 76 S. C. 517, 57 S. E. 475; *Wilson v. Dove*, 118 S. C. 256, 110 S. E. 390; *Lancaster v. Miller*, 151 S. C. 233, 148 S. E. 371; and *Priester v. Brabham*, 230 S. C. 201, 95 S. E. (2d) 167. If the respondent were not in possession, his remedy would be to bring an action on the law side of the Court to recover possession and thus test the title to the land. We point out that the appellants do not question the right of the respondent to maintain this action. So, it is logical to conclude that the respondent was in possession of the land at the time of the institution of the action.

We conclude that the trial Judge was correct in holding that the respondent had established title to the premises in question by adverse possession. We think that the evidence in this case is undisputed and susceptible of but one inference. It follows that the trial Judge was correct in granting the motion of the respondent for judgment *non obstante veredicto*.

Affirmed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, JJ.,
concur.

17736

Lydie M. ORTOWSKI, Respondent, v. E. F. ORTOWSKI, Appellant
(117 S. E. (2d) 860)

Proceeding on a divorced husband's motion for an order setting aside a divorce decree. The Common Pleas Court, Berkeley County, Thomas P. Bussey, J., denied the motion and the husband appealed. The Supreme Court, Taylor, J., held that the denial of the motion, based on alleged after-discovered evidence that wife had been engaged in an adulterous affair prior to the divorce, was not an abuse of discretion inasmuch as it appeared that the husband had had reason to believe, long before the divorce action was commenced, that something more than a casual relationship existed between the wife and another man and it was not clear that the substance of husband's contention had been discovered since the trial.

Affirmed.

1. NEW TRIAL.—In motion for new trial based upon after-discovered evidence, moving party must show that evidence is such as will probably change result, if new trial is granted, that it has been discovered since the trial, that it could not have been discovered before trial by exercise of due diligence, that it is material to the issue, and that it is not merely cumulative or impeaching. Code 1952, § 10-1213.
2. APPEAL AND ERROR—NEW TRIAL.—Motions for new trial based upon after-discovered evidence are addressed to sound discretion of hearing judge and his refusal will not be interfered with by reviewing court unless an abuse of discretion amounting to error of law is shown. Code 1952, § 10-1213.
3. DIVORCE.—Denial of husband's motion for new trial based on alleged after-discovered evidence that wife had been engaged in adulterous affair prior to divorce was not an abuse of discretion inasmuch as it appeared that husband had had reason to believe long before divorce action was commenced that something more than a casual relationship existed between wife and another man and it was not clear that substance of husband's contention had been discovered since the trial. Code 1952, § 10-1213.

Messrs. Hope & Cabaniss, of Charleston, for Appellant, cite: As to remarriage not being in itself, sufficient reason

to deny relief, particularly where no innocent party has acquired rights in the meantime: 105 S. E. (2d) 523, 233 S. C. 433; 17 Am. Jur., Divorce and Separation, Sec. 518. As to an action involving the dissolution of a marriage being one of peculiar concern to the State: 159 S. C. 506, 157 S. E. 830; 105 S. E. (2d) 523, 233 S. C. 433.

Messrs. Furman & Jenkins and Edward K. Pritchard, of Charleston, for Respondent, cite: As to motion for a new trial on the grounds of alleged after-discovered evidence being addressed to the discretion of the trial Judge, and his findings will not be disturbed except for clear abuse of discretion: 212 S. C. 325, 47 S. E. (2d) 785; 229 S. C. 44, 91 S. E. (2d) 723; 232 S. C. 381, 102 S. E. (2d) 368; 234 S. C. 1, 106 S. E. (2d) 447. As to re-marriage being not of itself a sufficient reason to deny relief, but it is an important factor to be considered: 233 S. C. 433, 105 S. E. (2d) 523; 17 Am. Jur., Divorce and Separation, Sec. 518. As to elements that must be shown by the moving party on a motion for a new trial on the grounds of alleged after-discovered evidence: 184 S. C. 158, 191 S. E. 905; 234 S. C. 1, 106 S. E. (2d) 447; Baileys Eq. 113; 1 Rich. Eq. 41; 47 S. C. 263, 25 S. E. 194. As to rules governing motions for new trial being the same in divorce cases as in other cases: 225 S. C. 261, 81 S. E. (2d) 898; 233 S. C. 433, 105 S. E. (2d) 523.

January 13, 1961.

TAYLOR, Justice.

This appeal is from an Order of the Honorable Thomas P. Bussey, Judge of the Ninth Judicial Circuit, refusing defendant's motion to set aside an Order previously entered wherein plaintiff was granted a divorce *a vinculo matrimonii* from the defendant, E. F. Ortowski, and to grant defendant a new trial upon the grounds of after-discovered evidence, said motion having been made under Sec. 10-1213, Code of Laws of South Carolina, 1952.

The summons and complaint were served on August 22, 1957, and on August 29, an Order was issued by the Honorable William H. Grimbball granting the plaintiff custody of the three minor children of the marriage and requiring defendant to vacate the premises where they were then residing.

The complaint alleged that plaintiff and defendant were married in Westport, Connecticut, on September 27, 1947, and that the marriage resulted in three children, Nancy, then age 8, Jean, age 5, and Ornelle, age 1 1/2. A divorce upon the grounds of physical cruelty was sought, it being alleged specifically that the defendant in May, 1957, choked and bruised the plaintiff, and that he struck and threatened her life with firearms on June 15, 1957, and that on August 9, 1957, he again struck her and threatened her life with firearms. Plaintiff asked for custody of the three children, the family automobile and household furniture, the savings which had been accumulated during the marriage amounting to approximately \$28,000.00 and was then kept in a joint savings account, and \$100.00 a month support for each of the three children.

The defendant interposed an answer denying the acts of physical cruelty alleged, requested that the Court endeavor to bring about a reconciliation between the parties, and should this prove impossible, asked that the Court grant custody in accordance with the best interest of the children and that the savings be placed in a trust fund for the children's future education.

Upon defendant's petition, the Court also issued an Order impounding the savings then deposited with the Cooper River Federal Savings and Loan Association.

The matter was referred to the Honorable Norman N. West, Master in Equity for Berkeley County, for a hearing. Reference was held on March 13, 1958, at which time the plaintiff, without objection by the defendant, was permitted to amend the prayer for relief. The complaint, as amended,

requested that the plaintiff be given custody of the youngest child, Ornelle, but consented to defendant having custody of the two older children. Plaintiff also relinquished any claim to the family automobile and certain personal property of the defendant, including \$4,200.00 in U. S. Savings Bonds.

Testimony was taken before the Master, who, on May 6, 1958, issued his report recommending that plaintiff be granted a divorce *a vinculo matrimonii*. The Master also recommended that the defendant be granted custody of the two older children and the plaintiff have custody of the youngest child, Ornelle. He also recommended that plaintiff be given approximately \$10,000.00 of the couple's accumulated savings and that the remaining \$18,000.00 be placed in a trust for the use of Ornelle, with plaintiff being given the right to draw \$125.00 each month for the child's support. He further recommended that plaintiff have the bulk of the household furniture with the exception of certain personal items awarded to defendant. The sum of approximately \$10,000.00 of the couple's accumulated savings and the bulk of the household furniture to be in lieu of any further alimony, dower, inheritance, or any other claim or demand whatsoever.

Defendant filed various exceptions to the Master's Report, but no exception was made to the award of approximately \$10,000.00. Argument on these exceptions was heard by the Honorable Thomas P. Bussey, who, on August 6, 1958, filed an Order modifying the Master's Report by awarding the bedroom furniture used by the two older children to defendant.

From this Order defendant served notice of intention to appeal on August 8, 1958, but on August 22, 1958, notice of withdrawing the intention to appeal was given and the Order consented to of August 6, 1958. On August 25, 1958, four days after the notice of intention to appeal was withdrawn, the plaintiff married one Vajislav Reinwein in Freeport, Illinois.

On September 12, 1958, the defendant filed a petition reciting therein that an Order granting plaintiff a divorce and awarding her \$10,000.00 alimony had been filed August 6, 1958; that the defendant had moved for an Order setting aside that decree on the ground of after-discovered evidence; that said motion was then pending before the Court; that the \$10,000.00 awarded the plaintiff was on deposit in North Charleston, and that the plaintiff left South Carolina and was about to remove the \$10,000.00, and asked that such funds be impounded until further Order of the Court. The matter was heard before the Honorable J. B. Pruitt, presiding Judge of the Ninth Judicial Circuit, who thereafter issued an Order dated September 12, 1958, impounding all funds.

On September 22, 1958, the defendant served the plaintiff, in Freeport, with notice of motion to reopen the action on the grounds of after-discovered evidence.

This motion was supported by various affidavits to the effect that the plaintiff was engaged in an adulterous affair with the said Vajislav Reinwein for a considerable period of time prior to the divorce action between the parties. Some of these affidavits contain allegations tending to impugn the fitness of plaintiff to have custody of any of the children of the parties. The affidavit of the defendant alleges and contends that the evidence of the illicit relationship contained in the affidavits presented to the Court was unknown to him until after the final decree of divorce; that he exercised due diligence; and that the evidence was material and could not have been timely discovered by him through the exercise of due diligence.

Honorable Thomas P. Bussey, after hearing, entered an Order denying this motion on May 22, 1959; and defendant now appeals contending that (1) the Court abused its discretion in refusing the defendant's motion to set aside the divorce decree and reopen the matter on grounds of after-discovered evidence, and (2) that the Court should

have taken into consideration the interest of the State in an action involving the sanctity of marriage.

In a motion for a new trial based upon after-discovery, covered evidence, the moving party must show (1) that the evidence is such as will probably change the result if a new trial is granted, (2) that it has been discovered since the trial, (3) that it could not have been discovered before the trial by the exercise of due diligence, (4) that it is material to the issue, and (5) that it is not merely cumulative or impeaching. *McCabe v. Sloan*, 184 S. C. 158, 191 S. E. 905. Such motions are addressed to the sound discretion of the hearing Judge and his refusal will not be interfered with by this Court unless an abuse of discretion amounting to error of law is shown. *Evatt v. Campbell*, 234 S. C. 1, 106 S. E. (2d) 447.

Defendant's wife was awarded, in lieu of alimony, approximately \$10,000.00 out of a sum of \$28,000.00 on deposit in a savings and loan association and the other \$18,000.00 is placed in a trust fund for the rearing and education of the youngest child, Ornelle, whose paternity, at least by implication, had been questioned, with custody being in plaintiff. No question appears as to the paternity of the other two children and they were placed in custody of defendant.

Defendant by way of answer set up, among other things, that his wife would absent herself from the home periodically and would refuse to give any explanation therefor and at the hearing she was cross examined with respect to her association with Dr. David Reinwein and their relationship. When defendant was being cross examined as to his purported clandestine meetings with a member of the WAF, he at one time replied, "Why don't you ask her about her association with Dr. David Reinwein" and later he testified that the plaintiff had been friendly with a doctor formerly stationed at the Navy Base named Reinwein. There is ample evidence to support the conclusion of the hearing Judge that the defendant had reason to

believe long before the divorce action was commenced that plaintiff's relationship with Dr. Reinwein was something more than a casual relationship.

Defendant further contends that the evidence presented in support of the motion for a new trial could not have been discovered before the trial by the exercise of due diligence because of a previous Court Order entered August 29, 1957, which required him to vacate and remove himself from the home and restrained him from harassing, molesting or interfering with plaintiff. The record reveals, however, that irrespective of the Order he visited the home some forty to fifty times for the purpose of visiting the children and upon occasions engaged in arguments with plaintiff. Irrespective of this, he certainly was not prevented by the terms of the Order from investigating the conduct of his wife. The affidavits filed in support of the motion were from close neighbors or persons closely associated with defendant, and he could have had knowledge of these things merely for the asking. Judge Bussey concluded that "this alleged new evidence probably was not discovered since the trial; at least not in its entirety" and, further, "In any event, it is not clear to me that the gist and substance of Defendant's contentions here have been discovered since the trial." The findings of the hearing Judge are not without evidentiary support and this being so there was no abuse of discretion amounting to error of law.

Defendant further contends that the Court should have taken into consideration the interest of the State in that the sanctity of marriage and the public interest are involved and cites *Fogel v. McDonald*, 159 S. C. 506, 157 S. E. 830, and *Grant v. Grant*, 233 S. C. 433, 105 S. E. (2d) 523. The hearing Judge in passing upon the motion for a new trial upon after-discovered evidence did so under the well-established rules governing such motions and defendant contends a different rule should apply with respect to divorce matters by reason of what was said in *Fogel v. Mc-*

Donald, supra, and *Grant v. Grant, supra*, respecting the sanctity of marriage and the public interest therein.

What this Court said with respect to the sanctity of marriage and the interest of the public in such matters in *Fogel v. McDonald, supra*, and *Grant v. Grant, supra*, is in nowise in contravention with the established rules governing motions for a new trial based upon after-discovered evidence, and we are of opinion that the Order appealed from should be affirmed; and it is so ordered. Affirmed.

STUKES, C. J., and OXNER, LEGGE and MOSS, JJ., concur.

17737

Dorothy S. BEASLEY, Respondent, v. FORD MOTOR COMPANY, Inc., Appellant
(117 S. E. (2d) 863)

Personal injury action. The Common Pleas Court of Darlington County, Julius B. Ness, J., entered \$7,500.00 judgment for plaintiff, and defendant appealed. The Supreme Court, Stukes, C. J., held that the award was grossly excessive.

Reversed and remanded for new trial.

1. AUTOMOBILES.—Evidence raised jury question as to negligence of automobile manufacturer sued by buyer's wife for injuries allegedly caused by fire under hood.
2. TRIAL.—The refusal to permit experiment as to whether gasoline in connection with hot plate would ignite was not abuse of discretion where fire under investigation occurred in hot motor under hood of automobile.
3. TRIAL.—Trial judge must determine whether conditions of experiment are similar to facts under investigation and if so has discretion to permit experiment in court.
4. DAMAGES.—Evidence disclosed that award of \$7,500 to passenger who alighted, without burns or other physical injuries, when fire broke out under automobile hood, was grossly excessive.

Messrs. Wright, Scott, Blackwell & Powers, of Florence, for Appellant, cite: *As to doctrine of res ipsa loquitor not being of force in this State*: 180 S. C. 436, 186 S. E. 383; 193 S. C. 51, 7 S. E. (2d) 641. *As to evidence being considered in the light of ordinary experience and such conclusions deduced therefrom as common sense dictates*: 192 S. C. 527, 7 S. E. (2d) 459; 126 S. C. 231, 119 S. E. 249. *As to rule that damages cannot be recovered for fright or mental suffering in the absence of bodily injury*: 84 S. C. 15, 65 S. E. 956; 93 S. C. 125, 75 S. E. 1018. *As to where a verdict is so clearly excessive as to indicate that it is the result of passion, caprice, and prejudice, the Supreme Court has the power to set the verdict aside and order a new trial*: 214 S. C. 410, 53 S. E. (2d) 60; 197 S. C. 263, 15 S. E. (2d) 353; 128 Colo. 436, 263 P. (2d) 815; 292 Ky. 461, 166 S. W. (2d) 996; 61 Ohio L. Abs. 17, 102 N. E. (2d) 855; 205 F. (2d) 267; 224 Minn. 286, 28 N. W. (2d) 687; 23 N. J. Super. 558, 93 A (2d) 206. *As to error on part of trial Judge in refusing to permit defendant's expert witness, a chemical engineer, to perform an experiment before the jury for the purpose of proving demonstratively the temperature required to ignite gasoline dropped on hot metal*: McCormick on Evidence 361, Sec. 169; 267 Mass. 501, 167 N. E. 235.

Messrs. James P. Mozingo, III, Benny R. Greer and Archie L. Chandler, of Darlington, for Respondent, cite: *As to a manufacturer of an automobile being liable to a remote vendee for injury caused by failure to properly and safely manufacture and inspect its product before the automobile is put into the hands of the general public for use*: 95 S. E. (2d) 601, 230 S. C. 320; 164 A. L. R. 585, Anno. *As to a person suffering serious injury without receiving broken bones or puncture type wounds to the body*: 103 S. E. (2d) 265, 232 S. C. 593. *As to the verdict not being so excessive as to indicate passion, prejudice, caprice or other consideration outside of the evidence*: 79 S. E. 406, 96 S. C. 267; 55 S. E. 522, 215 S. C. 404.

January 13, 1961.

STUKES, Chief Justice.

This is an action for damages for negligence in the construction and inspection of a Lincoln automobile, which was brought under the doctrine of the leading case of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, recognized in *Odom v. Ford Motor Co.*, 230 S. C. 320, 95 S. E. (2d) 601. See also, annotations, 164 A. L. R. 569 and 74 A. L. R. (2d) 1111. Respondent refers to the rule as that of the liability of a manufacturer to a remote vendee. It is noted that respondent was not a vendee, but the wife of such. However, appellant does not make the point; indeed, it admits in the brief (f. 43) that the complaint stated a cause of action.

There was verdict for respondent for \$10,000.00, after denial of the usual defensive motions. On motion *n. o. v.* or, in the alternative, for new trial, the court reduced the verdict to \$7,500.00 by order *nisi*, in compliance with which the respondent made remission, and from the judgment entered thereupon for \$7,500.00 this appeal has been prosecuted.

Respondent's husband, who is the Clerk of Court of Darlington County, purchased from appellant's Columbia dealer the automobile, as new, in September, 1958. However, it had formerly been in the hands of the Augusta, Georgia, dealer from whom the Columbia dealer purchased it and drove it to Columbia several months before. There it was alternately displayed in the show room and stored in the warehouse which was several miles away, having been driven back and forth numerous times.

A week after the purchase by respondent's husband he drove the car to Columbia, accompanied by respondent and others, for the purpose of attending a night football game at Carolina Stadium. Approaching it the traffic was heavy and it was a process of stop and go, with four lanes of one-way traffic. When a few hundred yards from the stadium a fire occurred under the hood of the automobile. The flames came

out of the front of the car and whipped back almost, at least, to the windshield. The driver and passengers, including respondent, naturally frightened, immediately alighted, without burns or other physical injuries. The driver went back, cut off the ignition and the flames died down. With the help of others they pushed the car to a nearby filling station, summoned a highway patrolman who put out the remaining fire with an extinguisher. Respondent's husband telephoned an employee of the dealer from whom he had purchased the car and he had it moved to its repair shop, providing another car for the use of respondent and her party after the game. Meanwhile they attended the game. It was raining and respondent spent part of the time under the stand. She and her husband then went to the dealer's repair shop where he examined the car, and he testified that he then found a loose connection of the flex (fuel) line where it entered the fuel pump. It was so loose that he could shake it. The dealer loaned to respondent's husband another car in which he and his party returned home and the dealer repaired the Lincoln.

Respondent's husband was called to Columbia by the dealer a few days later and there he met one Hodges who was introduced as a representative of the appellant. In the ensuing conversation Hodges admitted to respondent's husband that the mishap was the fault of appellant. Later there was a similar conversation of about the same content with another representative of appellant.

The first ground of appeal is the contention that appellant's motions for nonsuit, directed verdict and judgment *n. o. v.* should have been granted because there was no evidence of negligence on the part of appellant.

There was expert evidence introduced by appellant which tended to show (1) that the accident could not have happened as claimed because the flex line was so connected to the fuel pump that it could not work loose, (2) gasoline on an automobile motor will not ignite because the motor will not reach a high enough temperature, and (3) the gasoline cannot come in contact with the spark, which would ignite it. Con-

flicting testimony by a local mechanic was offered by respondent. The evidence need not be reviewed in greater detail because the admissions of appellant's representatives which were testified to by respondent's husband, made an issue, if otherwise, doubtful, for the jury as to the alleged negligence of appellant. Therefore the first ground of appeal is overruled. We refrain from the expression of any opinion on our part as to the weight of the evidence relating to the issue. Incidentally, if proper objection to the evidence of the admissions had been preserved, a nice question would be presented because of the nature and form of them. 20 Am. Jur. 462, Evidence, sec. 548; Annotation, 118 A. L. R. 1230; *Piedmont Mfg. Co. v. Columbia & Greenville Railroad Co.*, 19 S. C. 353.

As a part of appellant's expert evidence it offered to 2, 3 conduct an experiment by its witness which it was claimed would show that gasoline in contact with a hot metal surface will not ignite. It was proposed to use an ordinary hot plate by the witness on the stand to make the demonstration. Upon objection, the court refused to permit the experiment. Such was within the sound discretion of the trial Judge and we find no error. A hot plate in the hands of witness in the open court room would hardly be comparable to the hot automobile motor under the hood of it; nor was there evidence of the temperature which the hot plate would reach, whether comparable to the motor.

For an experiment to be admissible the conditions of it must be similar, or substantially similar, to the facts under investigation; and this must be determined by the trial Judge. After finding such similarity the court will exercise its discretion as to whether the experiment will be permitted. 20 Am. Jur. 627 *et seq.*, Evidence, secs. 755 *et seq.* "The admission of evidence of experiments or permitting them to be performed in court is a matter peculiarly within the discretion of the trial court, and this discretion will not be interfered with unless it is apparent that it has been abused." Sec. 755. In this case the result, which it was claimed the pro-

jected experiment would show was testified to by the witness. There was no abuse of discretion by the court.

- For the purpose of consideration of appellant's last
4 question the evidence relating to respondent's injuries
will be stated.

She testified that the fire frightened her terribly, made her extremely nervous. After she returned home about midnight she was slightly nauseated and could not sleep, called her family physician next morning, he came and prescribed phenobarbital which she was still taking at the time of the trial about a year later, was still nervous, suffered from nightmares and did not sleep well, was afraid of automobiles (although she admitted that she was still driving the car), has trouble concentrating, cannot help her high school son with his studies as formerly and was still under the doctor's care. It is noted that after the fire she accompanied her husband to the game although it was raining and she testified that she spent some of the time under the stand.

Respondent's husband testified that the accident made respondent very nervous, a poor sleeper and irritable, which she was not before. At the time of the accident, quoting, "she was white as a sheet", and "didn't act normal."

The physician, who is old and deaf and has been mayor of the town of Lamar for thirty years, had no records and had to be prompted to recall the time of the fire, on the next day after which he was called to respondent who told him about the fire and that she had been unable to sleep on the night after it and complained of nervousness. He gave her phenobarbital and had since given her "a little medicine at times along", having seen her ten or twelve times during the interval between the accident and the trial about a year later. There was no other medical testimony. There was no hospitalization or evidence of other expense incurred by respondent. Indeed, there is no evidence that she was even confined to bed for any time. She was not gainfully employed, so there was no loss of wages.

It is seen that the evidence of injury was slight, at best, and the verdict, even as reduced by the trial Judge, was out of all reasonable proportion to the injury. The appellant did not contend at the trial that there was no evidence to establish recoverable damages. However, there was contention there, and here on appeal, that the verdict was grossly excessive and the result of caprice, prejudice and bias, whereby appellant is entitled to a new trial absolute. With this we are constrained to agree.

In the complaint the damages were laid at \$10,000.00, including actual and punitive. Upon timely motion by appellant, and with the assent of respondent, the issue of punitive damages was withdrawn from the jury. Yet they returned verdict for \$10,000.00 actual damages, which was the full original amount sought in the complaint for actual and punitive damages. This rather conclusively showed disregard by the jury of the issues and the instructions of the court, or their failure to heed them. It is clear that the verdict was based upon considerations not founded on the evidence, which is the common expression of our cases on the subject.

A frequently quoted or paraphrased criterion was laid down by Chancellor Kent in an early New York case, as follows: "The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable, and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess." *Coleman v. Southwick*, 9 Johns. 45, 6 Am. Dec. 253. Note, Damages, by Marshall T. Mays, Esq., 11 S. C. Law Quarterly 35.

The following is from 15 Am. Jur. 623, Damages, sec. 205: "A close analysis of the results reached in the cases justifies the statement that the courts generally grant relief if convinced that the verdict substantially exceeds any ra-

tional appraisal or estimate of the damages even though the inference of passion, prejudice, partiality, or other improper motive on the part of the jury is no more natural or reasonable than the inference of mistake or misapprehension on their part. Like thought was expressed in *Nelson v. Chas. & W. C. Ry. Co.*, 231 S. C. 351, 98 S. E. (2d) 798, 802, where judgment was reversed for excessive verdict, as follows: "The delicate question is whether the compensation awarded for these elements is so grossly excessive as to warrant the inference that it was the result of caprice, passion, prejudice or other considerations not founded on the evidence. This phrase like the unhappily framed expression 'abuse of discretion' is frequently misunderstood. We have held that the term 'abuse of discretion' does not 'carry with it an implication of conduct deserving censure', *Payne v. Cohen*, 168 S. C. 459, 167 S. E. 665, 668, and does not imply 'any reflection' upon the person in whom the discretion is vested. *Bishop v. Bishop*, 164 S. C. 493, 162 S. E. 756. So, too, the phrase 'passion and prejudice' does not necessarily imply bad faith, wrongful purpose or moral delinquency. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513. In *Watson v. Paschall*, 100 S. C. 281, 84 S. E. 531, 532, this Court said that 'a verdict may properly be said to be capricious if it is against the overwhelming weight of the evidence.' "

No case has been cited, and we know of none, where a comparable verdict for actual damages has been sustained upon evidence of injuries as slight as those suffered by the respondent here. We cannot in good conscience avoid reversal. We quote again from the *Nelson case*, *supra*: "Even after giving due consideration to the diminished purchasing power of the dollar, we are convinced that upon the scant evidence presented, a verdict * * * is not supported by the evidence and cannot be explained on any rational basis. Whether it was the result of sympathy, passion or prejudice or whether it was due to mistake or misapprehension of the charge and issues involved, the result is the same. In the

discharge of our duty we cannot escape the responsibility of setting it aside."

Reversed and remanded for new trial.

TAYLOR and MOSS, JJ., concur.

OXNER and LEGGE, Justices (concurring in result).

In our opinion, the record reveals no injuries for which damages may be recovered. *Cp. Bosley v. Andrews*, 393 Pa. 161, 142 A. (2d) 263; *Reed v. Moore*, 156 Cal. App. (2d) 43, 319 P. (2d) 80. But the question is not raised by any exceptions. Accordingly, we concur in the result.

17734

STATE, Respondent, v. Walter James OUTEN, Appellant
(118 S. E. (2d) 175)

Prosecution for rape. The General Sessions Court, Richland County, James Hugh McFaddin, J., entered a judgment of conviction, and the defendant appealed. The Supreme Court, Moss, J., held that testimony of the physical condition of the prosecutrix within a few hours after the alleged rape was admissible, and that the evidence supported the conviction.

Affirmed.

1. RAPE.—Testimony of physical condition of prosecutrix a few hours after alleged rape was admissible, and was not excludable on theory it did not point to commission of crime, nor on theory it was too remote.
2. RAPE.—Evidence of physical and mental condition and appearance or demeanor of prosecutrix after an alleged rape is admissible.
3. CRIMINAL LAW.—Admissibility of testimony is largely within the sound discretion of trial judge, and its exercise will not be disturbed on appeal unless there has been an abuse or commission of legal error and prejudice to appellant.
4. CRIMINAL LAW—WITNESSES.—A wide discretion is vested in trial judge in ruling on objection to question as leading, and his ruling will not be disturbed unless there is an abuse of discretion.

5. CRIMINAL LAW.—Trial court would not be deemed to have erred in permitting solicitor to propound certain questions which allegedly were leading, where objections to some of such questions were sustained, and no motion for mistrial was made upon such ground.
6. CRIMINAL LAW.—In a capital case, the record is searched for prejudicial error, whether or not it was the subject of appropriate request, objection or motion in the trial court.
7. CRIMINAL LAW.—Record did not establish that defendant was entitled to new trial because held in custody for an unreasonable time prior to being charged with rape.
8. CRIMINAL LAW.—Record showed that trial judge did not err in rape prosecution in restricting defendant's counsel in examination of character witnesses.
9. CRIMINAL LAW.—A defendant could not ask his character witness whether, from his knowledge and from reputation of defendant, witness thought defendant was the kind of person to get into the difficulty he was in.
10. WITNESSES.—There was no error in permitting the state to recall the prosecuting witness in a rape prosecution.
11. WITNESSES.—Solicitor cross examining accused or his witness may not ask whether another witness has told the truth.
12. CRIMINAL LAW.—Asking defendant's character witness, on cross examination, if, after hearing testimony of prosecutrix and confession, he still said defendant's character and reputation were good, was harmless where witness answered "I don't know."
13. CRIMINAL LAW.—There was no error in instructing jury not to consider difference in race between rape prosecutrix and defendant, in view of testimony of defendant's remark to prosecutrix about such difference, and in view of appearances of prosecutrix and defendant.
14. CRIMINAL LAW.—A confession is not admissible unless voluntary, and state must show it was voluntary.
15. CRIMINAL LAW.—That confession is made while accused is in custody does not alone render it inadmissible, but conduct of officer obtaining confession will be rigidly scrutinized, and such fact will be considered by jury in determining voluntariness.
16. CRIMINAL LAW.—Evidence presented question for jury as to voluntariness of confession of rape.
17. CRIMINAL LAW.—Admission of confession of rape after deletion of question and answer relating to objectionable activity in area in which rape occurred was proper where remainder of confession was not interwoven with deleted matter.

18. CRIMINAL LAW.—If a proper separation cannot be made of pertinent parts of a confession and a reference therein to irrelevant material, it is proper for trial judge to submit entire confession to jury with appropriate instructions to disregard irrelevant part.
19. RAPE.—Evidence sustained rape conviction.

Sidney D. Duncan, Esq., of Columbia, for Appellant, cites: As to trial Judge erring in allowing the witness, a physician, to testify relative to the condition of the chief prosecuting witness when such testimony did not point to the commission of a crime: 158 S. C. 471, 155 S. E. 849; 228 S. C. 244, 89 S. E. (2d) 701. As to error on part of trial Judge in allowing Solicitor to use leading questions: 137 S. C. 145, 134 S. E. 885. As to Defendant being held in custody an unreasonable length of time before being formally charged with crime: 195 S. C. 101, 10 S. E. (2d) 145; 354 U. S. 449. As to trial Judge unduly limiting counsel for defendant in his cross examination of witness: 20 Am. Jur. 299, 307, Secs. 319, 327. As to error on part of trial Judge in allowing the Solicitor to pit one witness against another for the purpose of impeachment: 135 F. (2d) 693. As to error on part of trial Judge in allowing the introduction of the alleged confession when the evidence showed that such was not freely and voluntarily given: 77 S. Ct. 281; 338 U. S. 68, 69 S. Ct. 1354. As to when a confession is admissible, the whole of what the accused said upon the subject, at the time of making the confession, is admissible and should be taken together: 20 Am. Jur. 425, Sec. 488.

Messrs. T. P. Taylor, Solicitor, and John W. Foard, Jr., Assistant Solicitor, of Columbia, for Respondent, cite: As to testimony of physician, as to condition of prosecuting witness, being relevant and material, and properly admitted: 228 S. C. 244, 89 S. E. (2d) 701; 202 S. C. 443, 25 S. E. (2d) 484; 75 C. J. S. 530, Rape, Sec. 57 (b). As to error and irregularity in preliminary proceedings being waived when objection is not raised at trial or when resulting prejudice is not shown: 23 C. J. S., Criminal Law, Sec. 1429, p. 1127; 172 S. C. 129, 173 S. E. 77. As to limitation on

questions concerning Defendant's reputation: 204 S. C. 171, 28 S. E. (2d) 788. As to cross examination, as conducted by Solicitor, being proper: 165 S. C. 94, 162 S. E. 781; 175 S. C. 30, 178 S. E. 261. As to it being within the discretion of trial Judge to allow re-call of witness: Wharton's Evidence in Criminal Cases, 11th Ed., Sec. 1338, p. 2218; 31 S. C. L. 76; 15 S. C. L. 375; 58 Am. Jur. 314, Sec. 562. As to there being no evidence whatsoever that the confession was not freely and voluntarily given: 212 S. C. 237, 47 S. E. (2d) 521. As to the deletion of a nongermane and prejudicial statement contained in a confession in no way prejudicing the rights of the person giving the confession: 121 S. C. 443, 114 S. E. 415; 201 S. C. 387, 23 S. E. (2d) 244; (S. C.) 117 S. E. (2d) 379; Wharton's Evidence in Criminal Cases, 11th Ed., Sec. 606, p. 1016; 22 C. J. S. 1440, Criminal Law, Sec. 820. As to a new trial not being granted in absence of such substantial prejudice to the rights of the accused as to make it reasonably clear that a fair trial was not had: 23 C. J. S. 1125, Criminal Law, Sec. 1427; 228 S. C. 311, 89 S. E. (2d) 879.

January 11, 1961.

Moss, Justice.

Walter James Outen, the appellant herein, a Negro man twenty-nine years of age, was convicted of rape and sentenced to death. Sections 16-71, 16-72, of the 1952 Code of Laws of South Carolina.

The evidence for the State was that the prosecutrix, a white married woman, was a waitress in a restaurant in the City of Columbia and resided several miles north of the City near the Town of Dentsville. On November 11, 1959, after the prosecutrix had finished her days work as a waitress, she caught a bus at 10:15 p. m. to go home. She got off the bus some distance from her home in a rather isolated area. She waited until the bus went on by and then crossed the road to walk in the direction of her home. The appellant, emerging from some bushes at the side of the road, grabbed the pro-

secutrix from behind as she was attempting to run. She testified that he jumped on her back and threw her to the ground, having his hand over her mouth, and exhibited to her a knife. She says that the appellant asked her to go over in the bushes with him and that in response to this she told him to let her get up and she would. When he released her she attempted to escape and it was then that the appellant grabbed her and dragged her into a clump of bushes. She testified that the appellant held a knife on her and told her he was going to stick it in her if she attempted to escape again. After the appellant had dragged the prosecutrix into the bushes, he made known to her his intention to have sex relations with her, and "I told him that he couldn't mean that, and he said, 'Why? Because you are a white woman and I am a colored man,' and I told him that was one of the reasons and that 'I just don't do things like that,' and he told me that I was going to have to." She further testified that "he wanted me to kiss him like he was a white man" and he promised her "If I would kiss him, he would let me go, so I had to." She further testified that the appellant refused to let her go and she had to give in because he had the knife at her throat. She also testified that the appellant had sexual intercourse with her against her will. The prosecutrix testified that she was with the appellant about one hour and fifteen minutes and was allowed to leave upon the promise that she would not tell of the occurrence. When she arrived home, the officers were summoned and a complete description of the appellant was given. She described the appellant as wearing khaki pants, navy blue shirt, a jungle hat and that he was bare footed. The officers, within a short time after the report was made, tracked foot prints from the scene of the crime to the home of the appellant, where he was arrested and taken to headquarters. The prosecutrix there identified the appellant in two different police line-ups of colored men.

After the appellant had been identified by the prosecutrix, he was then questioned in the presence of the Sheriff and

two Deputy Sheriffs of Richland County, and a Negro policeman of the City of Columbia Police Department. The statement of the appellant was reduced to writing, a portion of which is in question and answer form. In the confession the appellant gave a detailed account of his raping the prosecutrix. In the confession he admitted that he did not have on any shoes, having left them at home to keep his wife from knowing that he was going out. He admitted also that he was wearing a tan tropical hard canvas cap, khaki pants and a blue shirt. All of the officers testified that the confession of the appellant was freely and voluntarily given.

It appears from the record that on November 12, 1, 3 1959, that the family physician of the prosecutrix examined her. He testified that there were scratches on the right side of her neck under the jaw, one to one and one-half inches in length, the right elbow was sore and tender, with a one-half inch square abraded area, and there were scratches on the right little finger. There were scratches to the left of the mouth and to the right of the nose, and there were abraded areas on both knees. There were three or four blue spots and an abraded area between the right knee and hip. There were scratches on both ankles and a hematoma about one inch square on the left leg. Her neck was marked and sore. There was generalized pelvic tenderness, especially on the right lower quadrant, with abraded areas on the right upper abdomen and over right hip. A hematoma was noted on the labia minora on the right side. This physician testified that when he saw the prosecutrix she was tense and agitated. The appellant asserts the Court erred in allowing the physician to testify relative to the condition of the prosecutrix because such testimony did not point to the commission of a crime. A review of the record does not show any proper objection by the appellant to the testimony of the physician, except objection was made to the form of one question propounded to the physician by the Solicitor. This objection was sustained by the trial Judge and the question was properly reformed and answered. We

think the testimony of the condition of the prosecutrix was properly admitted. Evidence of the physical and mental condition, and the appearance or demeanor of the prosecutrix after the alleged offense, is admissible. 75 C. J. S., Rape, § 57b, at page 530. It has also been held that on prosecution for rape it is competent to prove the physical condition of the prosecutrix immediately after the outrage, as tending to prove the commission of the offense. 44 Am. Jur., Rape, Section 73, at page 944. In *State v. Wagstaff*, 202 S. C. 443, 25 S. E. (2d) 484, this Court held that in prosecution for statutory rape, permitting the father of the prosecutrix to testify regarding her physical condition on her return to her home, on the day involved, was not error. We do not think the testimony of the physician was too remote, since it appears that his examination of the prosecutrix was conducted within a few hours after the alleged rape. In the case of *Allford v. State*, 31 Ala. App. 62, 12 So. (2d) 404, it was held that a physician was properly permitted to testify as to bruises appearing on the body of the prosecutrix when examined five days after the alleged offense. In addition to what we have said, we point out that the admission or rejection of proffered testimony is largely within the sound discretion of the trial Judge and his exercise of such will not be disturbed by this Court on appeal unless it can be shown that there has been an abuse of discretion, a commission of legal error in its exercise, and the rights of the appellant have been thereby prejudiced. *State v. Gregory*, 198 S. C. 98, 16 S. E. (2d) 532. This exception is overruled.

The appellant imputes error to the trial Judge in
4 permitting the Solicitor to propound certain questions which he contends were leading. He points to six instances from the record. In considering this exception we must keep in mind that it is well settled that where an objection is made to a question on the ground that it is leading, a wide discretion is vested in the trial Judge and his ruling thereon will not be disturbed in the absence of abuse of discretion. *State v. Lyles*, 210 S. C. 87, 41 S. E. (2d)

625, and *State v. Murphy*, 216 S. C. 44, 56 S. E. (2d) 736, 737 where it was said:

"We find no basis for appellant's second question. The trial Judge sustained her objections to the leading questions asked by the Solicitor and/or counsel assisting him. If opposing counsel persist in asking leading questions, although ruled out, then the aggrieved party, if he considers his cause injured thereby, should move for a mistrial. We do not find in this record where there was sufficient cause to invoke such a remedy. While on this subject, we desire to again state that it is seldom that the prefacing of a question by the phrase 'whether or not' relating to a material matter, removes it from the inhibited class of a leading question; and invite attention to the opinion of this Court authored by Mr. Justice Stukes in *State v. Cook*, 204 S. C. 295, 28 S. E. (2d) 842."

In the light of the foregoing decisions, we have examined the record in this case and the instances where the appellant charges the trial Judge with error. On four of the occasions to which appellant alleges error, the trial Judge sustained the objection made. The trial Judge, in another instance, without objection being made by the appellant, and on his own motion, sustained an objection to a question propounded by the Solicitor, and instructed the jury to disregard the question as asked, but he permitted an answer to the question when it was properly reformed. An examination of the record of the other instance, to which appellant directs our attention, shows that no objection was made by him nor was the question leading. We find no abuse of discretion on the part of the trial Judge in his rulings in this connection. If the appellant felt that he had been prejudiced by the Solicitor asking leading questions, even though objection thereto had been sustained, then he should have moved for a mistrial upon such ground. The record shows that no such motion was made. This exception is overruled.

The appellant charges that the trial Judge committed 6, 7 error in failing to grant a new trial on the ground that he was held in custody an unreasonable and abnormal length of time prior to being charged with the commission of a crime. The record shows that the appellant was arrested on November 12, 1959. He does not contend that his actual arrest was illegal. It is his contention that the failure on the part of the arresting officers to take him before a Magistrate or Judge to be dealt with according to law, made his detention illegal. A review of the appeal record does not show that this question was raised upon the trial of the case. If the appellant conceived that any prejudice had resulted to him by reason of his detention without being formally charged with the crime of rape before a Magistrate, this question should have been raised by proper objection or motion during the trial. We have held that where a party has the option to object or not as he sees fit, the failure to exercise the option when the opportunity therefor presents itself must, in fairness to the Court and to the adverse party, be held either to constitute a waiver of the right to object, or to raise an estoppel against the subsequent exercise thereof. We have also held that a party may not reserve vices in his trial, of which he has notice as here, taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain a new trial. *State v. Burnett*, 226 S. C. 421, 85 S. E. (2d) 744. In a case other than one involving capital punishment, this would suffice to dismiss the question, but in a capital case, and under the applicable rule of *in favorem vitae*, the record is searched for prejudicial error, whether or not it was the subject of appropriate request, objection or motion in the trial Court. We have carefully examined the record in this case and find nothing to support the contention of the appellant that he should have a new trial because he was held in custody for an unreasonable length of time prior to being charged with the commission of the crime of rape. There is an absence in the record of any affirmative statement supporting the contention of the appellant. This exception is overruled.

The appellant charges the trial Judge with error in
8 restricting his counsel in the examination of witnesses
as to the character of the appellant. A witness in behalf of the appellant testified that he had known him for a number of years. He said that the appellant had worked on his farm, performing usual farm labor. He testified to the good reputation of the appellant. The record then shows that the following took place:

“Q. Is there anything else about his family situation and surroundings that you can enlighten us about?

“The Court: Now, that probably would be too general, Mr. Monteith. I would have to sustain the State’s objection to that part of it.

“Mr. W. S. Monteith: In addition to working at the chicken yard, and helping take care of property, did he or did he not work and help members of your family at times?

“The Witness: Yes, sir.

“Mr. Foard: If your Honor pleases, working with members of his family—I don’t think he should go into a lot of details about working with members of his family. I don’t see what bearing that has on this case. He says he was employed over there by him, and later by Executors of the Estate, and later they hired him back.

“The Court: What is the relevancy of that, Mr. Monteith?

“Mr. W. S. Monteith: I frankly don’t see what it hurts. This is a man on trial for his life. It’s a capital offense case, and I think this jury is entitled to know all about him, regardless of any technicalities the Solicitor might keep wanting to inject into the case.

“Mr. Foard: Your Honor, now that borders on a little talk to the jury.

“The Court: Well, I will take the answer. You may answer the question.

“The Witness: Yes, sir, he worked in the house. He helped my mother do some painting, and he would work

around the yard and do her yard work late in the afternoon after he got through with the chickens. As a matter of fact."

The Court permitted this witness to detail the work the appellant had done for him and also to testify that the appellant helped take care of the witness's father-in-law. We do not think that the trial Judge limited or restricted the appellant in proof of his general reputation.

In *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, 627, this Court said:

"* * * There can be no doubt that when a witness is put upon the stand to attack or defend character he can only be asked, on the examination in chief, as to the general character of the person whose character is in question, and he will not be permitted to testify to particular facts, either favorable or unfavorable, to such person; but when the witness is subjected to cross examination he may then be asked, with a view to test the value of his testimony, as to particular facts. In the eye of the law the character of a person is to be ascertained by an inquiry as to what is generally said and thought of him in the community where he resides. Hence, when a witness has testified on his examination in chief that the person as to whose character the inquiry is instituted bears a good character, his opinion and the value of it may be tested by asking the witness on his cross examination whether he has ever heard that the person whose character is in question has been accused of doing acts wholly inconsistent with the character which he has attributed to him. This, according to our experience, has always been allowed on a cross examination, without question. * * *

In *State v. Logue*, 204 S. C. 171, 28 S. E. (2d) 788, 791, it is stated:

"This court has consistently adhered to the rule that the inquiry as to a defendant's reputation is to be limited to two questions; first, whether the witness knows that reputation; secondly, whether that reputation be good or bad. This rule,

of course, applies to defendant's witnesses on direct examination. * * *

A review of the record shows that counsel for the appellant was permitted not only to prove his good reputation but to give specific testimony as to his work record and his relationship to the family of the witness.

Another witness for the appellant was asked:

"Q. Are you or are you not then, familiar with his general reputation as to his character? A. Yes, sir, I am.

"Q. And knowing that, what was that reputation? A. I would consider it, Mr. Monteith, good.

"Q. You would consider it good? A. Yes, sir.

"Q. From your knowledge, and from the reputation he had, do you think he was the kind of person to get into this kind of difficulty?"

The Solicitor interposed an objection to this last
9 question and the Court sustained such. In so doing, we do not think the trial Judge committed error. It was proper for this witness to testify to the general reputation of the appellant but he could not express an opinion as to whether he was guilty of the crime with which he was charged. This exception is overruled.

The appellant asserts that the trial Judge committed
10 error in allowing the Solicitor to recall the prosecuting witness. When this witness first testified she described the attack made upon her by the appellant. She likewise identified the appellant as the one who had made such attack. After she had testified in chief she was cross examined by counsel for the appellant. Later in the trial the prosecuting witness was recalled to the witness stand to testify as to the length of time she was with the appellant. She fixed such period of time as approximately one hour and fifteen minutes. We do not think there was any error in permitting the State to recall this witness for further examination. In the case of *State v. Clyburn*, 16 S. C. 375, it appeared that after the

Solicitor had closed the case for the State and the first witness for the defense had been sworn and placed upon the stand, but before any question had been propounded to such witness, the Solicitor asked permission to recall a witness who had been previously examined for the purpose of proving a single fact which he had omitted to prove. The Court granted permission to reexamine the witness and the appellant asserted error. This Court in disposing of the exception, said:

"The conduct of a case in the Circuit Court, so far as relates to the time when testimony may be introduced, must be left to the discretion of the Circuit Judge, to be governed by the particular circumstances of each case. *Matthews v. Heyward*, 2 S. C. 247. Indeed the courts of this State have gone so far as to hold that a Circuit Judge may, in his discretion, permit a plaintiff to introduce other evidence even after a motion for a nonsuit has been made and argued. *Browning v. Huff*, 2 Bailey 179; *Poole v. Mitchell*, 1 Hill 404; and these cases have been recognized and followed by this court in the recent case of *Kairson v. Puckhaber*, 14 S. C. 627. So in *Colclough v. Rhodus*, 2 Rich. 78, it was held that a Circuit Judge might, in his discretion, permit a witness to return to the stand and testify after the case had been submitted to the jury and they had been addressed by counsel. It is true that these were civil cases, but the rules of evidence, with certain exceptions not applicable here, are the same in both civil and criminal cases. 1 Greenl. Evid. 65; *State v. Rawls*, 2 N. & McC. 331." See also *Petrie v. Columbia & Greenville R. Co.*, 27 S. C. 63, 2 S. E. 837, and *Hornsby v. South Carolina Ry. Co.*, 26 S. C. 187, 1 S. E. 594.

This exception is overruled

Appellant asserts that the trial Judge committed error
11 in allowing the Solicitor to pit one witness against another for the purpose of impeachment. It is improper for the Solicitor, in the cross examination of the accused or a witness for him, to ask whether or not another

witness has told the truth, because to do such would force such witness to attack the veracity of the other witness. *State v. Warren*, 207 S. C. 126, 35 S. E. (2d) 38, and *State v. Harriott et al.*, 210 S. C. 290, 42 S. E. (2d) 385.

A witness for the appellant had testified to his good
12 reputation. On cross examination he was asked if he had heard the testimony of the prosecutrix and the appellant's confession. He answered this in the affirmative. He was then asked if after hearing this testimony and the confession, "Do you still say his character and reputation is good?" To which the witness answered, "I don't know, sir." Assuming this question to be improper, no prejudice resulted to the appellant in view of the answer made by the witness. In this connection we quote from *State v. Lyles*, 210 S. C. 87, 41 S. E. (2d) 625, 627, the following:

"Such cross examination is subject to the discretionary control of the trial Judge who should restrain its abuse. The cross examiner must be fair and act in good faith. The matters inquired about should not be merely chimerical, or drawn from the vivid imagination of opposing counsel, but the inquiry should be directed only to those matters concerning which the cross examiner has information warranting a reasonable belief on his part that the fact is as is implied by the question."

A review of the record does not show that the Solicitor asked any question of this witness for the purpose of embarrassing or humiliating him. The appellant had the right to offer character witnesses in his behalf, and in the exercise of this constitutional right, such witnesses should be protected from personal abuse and improper insinuations against their character. *State v. King*, 158 S. C. 251, 155 S. E. 409. A review of the record convinces us that at no time did the Solicitor abuse any of the witnesses offered by the appellant. We think this exception of the appellant is without merit.

The appellant alleges that the Court committed error
13 in charging the jury that he was of one race and the prosecutrix of another. The charge of the trial Judge was as follows :

“I charge you further that because the defendant is of one race and the prosecuting witness is of another should not in any manner weigh either for or against him, one or the other. That is not an issue in the matter, and you are to give it no consideration whatsoever.”

In connection with this exception we recur to the testimony of the prosecutrix where she said that after the appellant had stated his intention to have sexual intercourse with her, and “I told him that he couldn’t mean that, and he said, ‘Why? Because you are a white woman and I am a colored man,’ ”. In addition to this, it was perfectly apparent to the jury that the prosecutrix and the appellant were of different races. We think that the charge as made by the trial Judge was favorable to the appellant, and it was proper for the trial Judge to give this cautionary instruction to the jury. The case of *State v. Barwick*, 89 S. C. 153, 71 S. E. 838, 839, is in point on this question. We quote therefrom :

“One of the witnesses for the defense admitted that he may have said in a joking way, without meaning it, that the country was going to the devil if they would convict a white man for killing a negro. The court charged the jury. ‘The law is applicable the same to every man. The law knows no pets. The law knows no difference between an Indian, Japanese, a citizen of the state, an African or a Caucasian. I could not charge you different law according to the parties interested, much less could you try the facts differently, the parties being of a different race, either Japanese, Chinese, African, or Caucasian. There is no color line in the law, and there shall be none under your oath in the jury box.’

“The appellant excepts to this charge as upon a matter not in issue, and as tending to divert the jury from the true consideration of his defense. We think the charge was not

only sound, but was proper in the circumstances and could not possibly have prejudiced any right of defendant.”

In the case of *McLaurin v. Williams*, 175 N. C. 291, 95 S. E. 559, the North Carolina Supreme Court held that where a party to a litigation is white and the other is colored, it is not error for the Court to instruct that the jury should be fair and just and give a fair and impartial hearing regardless of the color of the litigants. See also *State v. Evans*, 177 N. C. 564, 98 S. E. 788.

The appellant complains that the trial Judge erred in allowing the introduction of his confession when the evidence showed that such was not freely and voluntarily given.

It is axiomatic that a confession is not admissible 14, 15 unless it is voluntary. It necessarily follows that the burden rests upon the State to show that it was voluntary, and there is no presumption of law that it was voluntary. The mere fact that a confession is made while the accused is in custody does not render it inadmissible. However, the conduct of the officer obtaining the confession will be rigidly scrutinized and the fact that it is made while the accused is under arrest is a circumstance, along with the other facts and circumstances to be taken into consideration by the jury in determining its voluntariness. *State v. Bullock*, 235 S. C. 356, 111 S. E. (2d) 657.

An examination of the record shows that the only 16 evidence in this case was to the effect that the confession of the appellant was voluntary and that a copy of such confession was given to the appellant in conformity with Sections 1-64 and 26-7.1 of the 1958 Cumulative Supplement to the 1952 Code. All of the witnesses who were present when the appellant made his confession testified that the same was freely and voluntarily given, and that the appellant was not intimidated, abused or threatened in any manner. No evidence was offered in behalf of the appellant to the contrary. The trial Judge submitted to the jury, under an appropriate charge, the issue as to whether the confes-

sion of the appellant was voluntary or involuntary. We find no error on the part of the trial Judge in admitting into evidence the confession of the appellant.

When the Solicitor offered in evidence the confession of the appellant, his counsel objected to its admission, stating "We do not interpose that objection because of the manner in which the statement was taken, but because of some of the contents thereof." The objection was to the following question and answer:

"Q. Walter, we have had lots of complaints about a man prowling around homes at night in that community. Have you been going out without shoes and watching white women in their houses in that community before? A. No, sir."

The Solicitor agreed to delete the foregoing question and answer. Thereupon, this question and answer were physically removed from the confession by cutting it out of the confession and entirely removing it therefrom. After this had been done, counsel for the appellant objected to the admission of the confession on the ground that a portion of it had been deleted. The trial Judge admitted the confession without the deleted part. The appellant assigns error.

Ordinarily when a confession is admissible, the whole of what the accused said upon the subject at the time of the making of the confession is admissible and should be taken together. If the prosecution fails to prove the whole statement, the accused is entitled to put in evidence all that was said to and by him at the time, which bears upon the subject of the controversy, including exculpatory or self serving declarations connected therewith. 20 Am. Jur., Evidence, Section 488, page 425. However, the appellant here objected to only the portion of his confession which the State agreed to delete. The remaining part of the confession related to the offense with which the appellant was charged. It has been held that when the parts of a conversation connected with a confession of crime charged can be separated from those re-

lating to other offenses, only those parts which are material to the crime charged should be received in evidence. *Com. v. Wilson*, 186 Pa. 1, 40 A. 283. *People v. Spencer*, 264 Ill. 124, 106 N. E. 219, 225. In the last cited case, it was said:

"The general rule is that a statement in the nature of an admission or confession, in order to be admissible, must relate to the offense in question. While the fact that such statement may include another offense as well as that charged does not prevent the confession being received and going to the jury with proper instructions when there can be no separation of the relevant from the irrelevant parts, when the relevant parts can be separated from the irrelevant, this must be done, and that part only of the confession admitted which is material to the issues on trial."

In the case of *State v. Fowler*, 230 N. C. 470, 53 S. E. (2d) 853, 856, the North Carolina Supreme Court said:

"* * * Moreover, the right of the confessor to have his confession considered as given, in its entirety, with whatever views or theories it affords, *State v. Jones*, 79 N. C. 630, may not extend to the prosecution, for if the part pertaining to the crime charged can be separated from the part relating to other offenses, only the part material to the inquiry should be received in evidence under the rule. * * *"

We do not have here a confession which is so inter-
 18 woven with the challenged statement that the two cannot be separated without twisting or distorting the pertinent parts. Since the confession is in question and answer form, that part to which the appellant objected can be deleted from the record and the relevant part submitted to the jury. If, however, a proper separation could not have been made, it would have been proper for the trial Judge to submit the entire confession to the jury with appropriate instructions to disregard the irrelevant parts of the confession where a statement had been made with reference to other crimes. We do not think there was any error on the part of the trial Judge in admitting the confession of the

appellant with the above quoted portion deleted therefrom. Certainly, the confession as admitted was material to the crime charged against the appellant.

What we have heretofore said disposes of all questions raised by the appellant but in keeping with our invariable rule of *in favorem vitae* we have carefully examined the record for any errors affecting the substantial rights of the appellant, even though not made a ground of appeal. We find no error.

A review of the testimony in this case convinces us
19 that the conviction of the appellant is clearly correct.

The evidence leaves no doubt of the guilt of the accused. He had a fair trial and we are convinced that no other verdict could have been reasonably returned on the evidence other than the verdict reached in this case.

The judgment of the lower Court is affirmed.

Affirmed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, JJ.,
concur.

17738

Henry Lyndal LEE, Jr., Respondent, v. Jacqueline S. LEE, Appellant
(118 S. E. (2d) 171)

A husband sued for divorce on the ground of adultery. The Civil Court of Darlington County, Malcolm K. Johnson, J., rendered a divorce decree in favor of the husband, and the wife appealed. The Supreme Court, Moss, J., held that the evidence sustained the finding that the wife was guilty of adultery.

Judgment affirmed.

1. APPEAL AND ERROR.—Supreme Court's duty in equity case to review challenged findings of fact does not require that it disregard findings below or ignore fact that trial judge was in better position to evaluate credibility.

2. APPEAL AND ERROR.—Supreme Court's duty in equity case to review challenged findings of fact does not relieve appellant of burden of convincing Supreme Court that trial judge erred.
3. DIVORCE.—“Preponderance of evidence” necessary to establish adultery in divorce suit is evidence which convinces as to its truth. Code 1952, §§ 20-101(1), 20-105.
See publication Words and Phrases, for other judicial constructions and definitions of “Preponderance of Evidence”.
4. DIVORCE.—Evidence sustained finding that wife was guilty of adultery so as to entitle husband to divorce. Code 1952, §§ 20-101(1), 20-105.
5. DIVORCE.—Wife was not entitled to any support from husband granted divorce for adultery. Code 1952, §§ 20-101(1), 20-118.
6. DIVORCE.—Husband who obtained divorce for adultery was liable for support of children whose custody was awarded to wife. Code 1952, § 20-101(1).
7. DIVORCE.—Wife awarded custody of two children by divorce decree was entitled to reasonable amount for their support in accordance with husband's ability to pay.
8. DIVORCE.—Amount for support of minor children of divorced parents is generally within sound discretion of court, after consideration of all circumstances of case.
9. DIVORCE.—Award to wife by divorce decree of only \$80.00 a month and \$250.00 on September 1 and December 15 of each year for support of two girls was not inadequate where husband earned about \$4,760.00 a year and wife \$2,288.00.

George W. Keels, Esq., of Florence, for Appellant.

Messrs. James P. Mozingo III, Benny R. Greer and Archie L. Chandler, of Darlington, for Respondent, cite: As to the findings made by the trial court being supported by the evidence, and should not be disturbed: 228 S. C. 149, 89 S. E. (2d) 225; 224 S. C. 520, 80 S. E. (2d) 123; 215 S. C. 502, 56 S. E. (2d) 330. As to the provision of support for the minor children involved being adequate and is a proper exercise of the judgment and discretion of the Trial Judge: 231 S. C. 283, 98 S. E. (2d) 764.

January 24, 1961.

Moss, Justice.

Henry Lyndal Lee, Jr., the respondent herein, brought this action against Jacqueline S. Lee, the appellant herein,

for a divorce upon the ground of adultery. Section 20-101-(1), 1952 Code of Laws of South Carolina. The appellant answered and denied the allegation of the complaint that she was guilty of adultery, and asserted affirmatively that the respondent was guilty of adultery, and such barred him from obtaining the divorce decree.

The cause was heard by the Honorable Malcolm K. Johnson, Judge of the Civil Court of Darlington County, without a reference. After the trial Judge had heard the evidence, he entered a decree holding that the appellant was guilty of adultery and that the respondent was entitled to a divorce on such ground. He awarded custody of one child to the respondent and the other two children to the appellant, and provided that the respondent should pay to the appellant for the support and maintenance of the two minor children, the sum of \$80.00 per month and in addition thereto the sum of \$250.00 on September 1, and a like sum on December 15 of each year, or a total of \$1,460.00 per year. He also granted visitation rights to the parties. From this decree the wife has appealed, claiming that the charge of adultery was not established by a preponderance of the evidence. She further asserts that the award of support money for the children was totally inadequate to maintain them.

The respondent and the appellant were married on September 6, 1947, and three children were born of the marriage. The parties separated on December 13, 1959, and have not since lived together. The respondent is employed as a game warden and is paid an annual salary of \$2,760.00. In addition thereto, he farms with his mother and has a net income of approximately \$2,000.00, making a total yearly income of \$4,700.00. The appellant is employed at the Hartsville Manufacturing Company and receives, after all deductions, approximately \$44.00 per week for her services, or \$2,288 per year. The respondent owns the house in which the parties formerly lived and he is making monthly payments on an indebtedness of \$19,000.00 thereon. It fur-

ther appears that the respondent, in addition to the amount required to be paid by the trial Judge, also paid for medical attention to one of the children in the custody of the appellant.

This action is one in equity. Section 20-105 of the 1, 2 1952 Code. Our duty in equity cases to review challenged findings of fact does not require that we disregard the findings below or that we ignore the fact that the trial Judge, who saw and heard the witnesses, was in better position than we are to evaluate their credibility; nor does it relieve the appellant of the burden of convincing this Court that the trial Judge erred in his findings of fact. *Inabinet v. Inabinet*, 236 S. C. 52, 113 S. E. (2d) 66. In the instant case, the trial Judge saw the witnesses, heard the testimony delivered from the stand, and had the benefit of that personal observance of and contact with the parties which is of peculiar value in arriving at a correct result in a case of this character. *Evatt v. Campbell*, 234 S. C. 1, 106 S. E. (2d) 447, and *Meyerson v. Malinow*, 231 S. C. 14, 97 S. E. (2d) 88, 65 A. L. R. (2d) 194.

In the case of *Brown v. Brown*, 215 S. C. 502, 56 S. E. (2d) 330, 335, 15 A. L. R. (2d) 163, it was said:

“The proof of adultery as a ground for divorce must be clear and positive, and the infidelity must be established by a clear preponderance of the evidence. The proof must be sufficiently definite to identify the time and place of the offense, and the circumstances under which it was committed. It is not necessary that the fact of adultery be proved by direct evidence, but, as stated *infra* § 139b, it may be sufficiently proved by indirect or circumstantial evidence, or it may be proved by evidence consisting in part of both. However, if after due consideration of all the evidence the proof of guilty is inconclusive, a divorce will be denied * * *.’ 27 C. J. S., Divorce, § 139a.”

The evidence offered by the respondent to establish the charge of adultery against the appellant was given by one

Dwight Yarborough. He testified that he had been a game warden for twenty-five years; that he was personally acquainted with the respondent and the appellant, and also one Blane McNeese, the alleged paramour of the appellant. This witness testified that on May 18, 1957, between 10:00 and 12:00 o'clock a. m., that he had gone to a wooded area four or five miles South of Florence for the purpose of banding doves, which was a part of his job. He further testified that in going to this wooded area he saw the appellant and one Blane McNeese having sexual intercourse in such area. He further testified that after this act of coition these parties removed themselves from the compromising position and the witness observed the paramour of the appellant adjusting his pants. This witness further testified that when he had finished his work and was returning to Florence, he observed the appellant and Blane McNeese driving towards Florence in her car. He testified that he informed the respondent of the conduct of the appellant and one Blane McNeese on December 16, 1959, after the husband and wife had separated.

The respondent had no actual knowledge of any act of adultery committed by the appellant. However, he did testify that his wife was never at home when she should be and that she was out all the time at night when she was off from work. He further said that while he was working at a booth at the Florence County Fair he observed his wife and another woman attending the fair with Blane McNeese.

Blane McNeese testified in behalf of the appellant and denied having sexual relations with her. However, he admitted that he had known the appellant for twelve years and lived within four blocks of the residence of the parties to this action. He says that after the separation of the respondent and appellant "I admitted to him that I had been off with her." He explained that he meant by this admission that on two occasions the appellant had taken him to work and on another occasion had brought him back home

from work. This witness was also asked on cross examination if he had been guilty of adultery with the appellant, would he admit it? In response to this question, he said, "I think it would be a mighty sorry man that would, don't you?" He was further asked if it were true would he admit it in the presence of the appellant and the respondent. He answered, "I would not admit it to no one under oath." This witness also testified that he was employed by Sonoco Products at Hartsville, South Carolina, and produced a punch clock slip showing that on May 18, 1957, that he went to work at 6:47 o'clock a. m. and punched out from his work at 3:08 p. m. There were no other witnesses produced to substantiate the presence of this witness at work on the day in question.

The appellant testified that she knew Blane McNeese, that he was a mighty good friend of their family, but she denied having sexual relations with him at any time, and particularly with reference to the time and place testified to by the witness Yarborough. In her testimony she accused the respondent of having an affair with a certain married woman and that she with her father and mother, between the first and second hearings in this case, found him in a secluded spot in the woods, in the front seat of his car, with this woman and "they were hugging or kissing, or whatever you want to call it." There was no testimony of any act of adultery of the respondent with this woman.

The crucial issue in this case in the credibility to be given to the testimony of the appellant and of McNeese, her alleged paramour. The trial Judge did not credit the testimony of these two witnesses. However, he did accept as true the testimony of the witness Yarborough as to the adulterous act engaged in by the appellant and McNeese. The testimony, as given by the witness Yarborough was clear and positive. He definitely identified the parties and the time and place of the alleged act of adultery on the part of the appellant and McNeese. The trial Judge saw the witnesses, heard their testimony delivered from the stand, and

had that personal observance of and contact with them, which is of peculiar value in arriving at a correct result.

The appellant does not contend that the findings of 3, 4 the trial Judge are without evidentiary support but she does insist that the testimony offered by the respondent does not establish by a preponderance thereof that she was guilty of adultery. A "preponderance of the evidence" stated in simple language is that evidence which convinces as to its truth. *Frazier v. Frazier*, 228 S. C. 149, 89 S. E. (2d) 225, 234. A preponderance of the evidence is not made out by the greater number of witnesses. *James v. Gaffney Mfg. Co.*, 158 S. C. 386, 155 S. E. 588. In the cited case the trial Judge charged the jury that they might find the truth to lie in the mouth of a single witness. In the instant case the trial Judge has found, as he had a right to do, that a preponderance of the evidence was made out by the witness Yarborough. We cannot say that the trial Judge was in error in so doing. We think there was credible evidence upon which the trial Judge could conclude that the appellant was guilty of adultery.

The only other question to be determined on this appeal is whether the trial Judge was in error in granting only \$80.00 per month, and \$250.00 on September 1, and December 15 of each year, for the support of the two girls whose custody was awarded to the appellant. She asserts that this amount of support money is totally inadequate to maintain the two children.

The appellant was not entitled to any support from 5-8 the respondent because alimony cannot be granted to an adulterous wife. Section 20-113, Code of 1952. However, the legal liability of the father to support his infant children remains after a divorce. *Campbell v. Campbell et al.*, 200 S. C. 67, 20 S. E. (2d) 237. Since the custody of two of the children of this marriage was awarded to the appellant, she was entitled to a reasonable amount for their support, in accord with the husband's ability to pay.

Wolfe v. Wolfe, 220 S. C. 437, 68 S. E. (2d) 348. The amount of the allowance for the support of minor children of divorced parents is generally within the sound discretion of the Court and all the circumstances of the particular case should be considered in fixing it.

The respondent earns approximately \$4,760.00 per
9 year. From this sum he is paying \$1,460.00 for the support of the two minor children now in custody of the appellant. This leaves the respondent the sum of \$3,300.00 to support himself and the child whose custody he has, and to make payments on an indebtedness of \$19,000.00, owed for the construction of a home. The appellant has \$2,288.00 net income from her employment and this with \$1,460.00 paid to her by the respondent amounts to the total of \$3,748.00 for the support of herself and the two children. The appellant admits that in addition to the amount so paid under the order of the trial Judge for the support of the two minor children whose custody she has, that the respondent has paid the medical expenses of one of these children. We think that the trial Judge exercised a sound discretion in the award made to the appellant for the support of the two minor children whose custody is with the appellant. We find no error. Of course, this adjudication is not final in the face of changed conditions and circumstances which may be made the grounds for future application to the Court for the modification of the allowance for support of these two children. Section 20-115, of the 1952 Code.

The judgment of the lower Court is affirmed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, JJ.,
concur.

17739

Jesse W. BRABHAM, Appellant, v. MILLER ELECTRIC COMPANY
and International Brotherhood of Electrical Workers, AFL-CIO,
of which Miller Electric Company is, Respondent
(118 S. E. (2d) 167)

Action by a general foreman against his labor union and his employer, for unlawful termination of his employment in violation of the state right to work law. From an order of the Common Pleas Court, Lexington County, James B. Pruitt, J., sustaining the employer's demurrer, the plaintiff appealed. The Supreme Court, Legge, J., held an agreement between the employer and the union conditioning employment upon the referral or approval of the union was illegal, and the employer's action in terminating employment pursuant to the agreement was a violation of the right to work law.

Reversed and remanded.

1. LABOR RELATIONS.—Agreement between employer and labor union conditioning employment or continuance thereof upon referral or approval of union was illegal, and employer's action in terminating employment pursuant to the agreement was violation of right to work law. Code 1952, §§ 40-46 *et seq.*, 40-46.2.
2. LABOR RELATIONS.—The legislative intent and remedial purpose of right to work statute were directed toward evils of union control of employment on the one hand, and of employer boycott of, or insistence upon, union labor on the other. Code 1952, § 40-46 *et seq.*
3. LABOR RELATIONS.—Complaint by general foreman was sufficient to state cause of action against employer for unlawful termination of employment in violation of right to work law, on theory that employer refused to continue employment solely because of nonapproval by labor union of the employment. Code 1952, §§ 40-46 *et seq.*, 40-46.7 to 40-46.9.
4. LABOR RELATIONS.—Employer's freedom to hire and fire employee at its pleasure was subject to limitation, under right to work law, that neither hiring nor firing might be grounded or conditioned upon union membership or nonmembership, referral or nonreferral, approval or nonapproval. Code 1952, § 40-46 *et seq.*
5. APPEAL AND ERROR.—Issue of exclusive federal jurisdiction over employee's action against employer for violation of state right to

work law was not properly before Supreme Court on review of trial court's sustaining employer's demurrer, where issue was not passed upon by trial court. Code 1952, § 40-46 *et seq.*; Labor Management Relations Act of 1947, 29 U. S. C. A. § 141 *et seq.*

Thomas C. Bradley, Jr., of Columbia, for Appellant, cites: As to employer requiring employee to have membership in labor organization in order to continue employment being violative of Right to Work Law: 26 C. C. H. Labor Cases 68647; 280 P. (2d) 295; 236 S. W. (2d) 683; 264 S. W. (2d) 48; 299 S. W. (2d) 8; 101 S. E. (2d) 800; 347 U. S. 17, 74 S. Ct. 323. As to State Court being proper forum: 233 F. (2d) 263; 101 S. E. (2d) 800.

Messrs. Charles W. Knowlton and Boyd, Bruton & Lumpkin, of Columbia, for respondent, cite: As to the law in South Carolina being that a contract of employment may be terminated, at will, at any time by either party: 219 S. C. 272, 64 S. E. (2d) 878. As to statute at issue being a penalty statute, and, therefore, subject to strict construction: 189 Va. 878, 54 S. E. (2d) 872; 79 So. (2d) 199; 139 Colo. 236, 337 P. (2d) 953; 208 Ga. 541, 67 S. E. (2d) 767. As to State Court not being proper forum in instant action: 347 U. S. 17, 98 L. Ed. 455; 277 Fed. (2d) 217. As to the Federal statutory language not delegating any enforcement powers: 139 Colo. 236, 337 P. (2d) 953.

January 30, 1961.

LEGGE, Justice.

This is an action for damages alleged to have resulted from unlawful termination of plaintiff's employment in violation of the South Carolina Right to Work Law (48 Stat. at L. 1692). Plaintiff appeals from an order sustaining the defendant company's demurrer to the complaint.

The allegations of the complaint are, in substance, as follows:

In March, 1958, plaintiff, a member of the defendant union, was in the employ of the defendant company as a general foreman on a construction job in Lexington County.

On March 24, the journeymen electricians employed by the defendant company walked off the job and refused to work during the rest of that day and for several days thereafter. Plaintiff did not join in the walkout at any time; but on the afternoon of March 24, being told by the superintendent, Mr. Winters, that there would be no pay for the rest of that day, plaintiff and the other foremen left the job. Early next morning plaintiff went to the project site for the purpose of going to work as usual; he found a large number of men milling around the entrance gate, and, after waiting near the gate for a short while, he realized that no one was working or going to work, and therefore returned to his home. On the evening of the following day, in response to a message from Mr. Baker, the defendant company's assistant superintendent, he telephoned Mr. Baker, who told him to see Mr. Jones (the representative of the defendant union) and come back on the job. On the following day plaintiff went to see Mr. Jones at his headquarters in Columbia, but Mr. Jones refused to give him permission to return to the job, stating as his reason that plaintiff had engaged in the unauthorized walkout of March 24 and therefore was not in good standing with the union. Plaintiff then telephoned Superintendent Winters and informed him of Jones' refusal to approve his return to the job, whereupon Winters told plaintiff that they were doing all they could to get him back on the job, and that he, Winters, would see Jones about it. Later, plaintiff received a telephone call from Assistant Superintendent Baker to the effect that they hoped to be able to get him back on the job in a few days. Finally, on April 9, Superintendent Winters told plaintiff that he could not come back to work except with the union's approval. The defendant union has refused to approve him for employment because it considers him as not in good standing. The defendant company bases its refusal to permit him to return to work solely upon the ground that he has not been cleared through the defendant union. Plaintiff is informed and believes that the defendants

have an agreement whereby membership in good standing in the defendant union is required as a condition to employment or continued employment by the defendant company. The action of the defendants in thus conditioning employment, or continuance of employment upon clearance through and referral by the defendant union is in violation of the Act of March 19, 1954 (48 Stat. at L. 1692); and as the result of such action the plaintiff has sustained damage.

The defendant union answered; and this appeal is concerned only with the defendant company's demurrer and the order of the circuit court sustaining it. The demurrer was for insufficiency, charging that the complaint, on its face:

1. Showed no violation of the Right to Work Law, because it affirmatively showed that the plaintiff had not been discharged from membership in the defendant union;

2. Affirmatively showed that plaintiff had participated in a strike or walkout and that the defendant company therefore had valid ground for discharging him;

3. Failed to show that the defendant company was obligated by contract or law to hire the plaintiff or to continue his employment;

4. Affirmatively showed that the controversy was one exclusively within the purview of the Federal Labor Management Relations Act, 29 U. S. C. A. § 141 *et seq.*, and without the jurisdiction of the state courts; and

5. Failed to allege violation of any duty or obligation owed to the plaintiff by the defendant company.

The Act of March 19, 1954, which appears in the 1960 Supplement to the Code of Laws, 1952, as Sections 40-46 through 40-46.11, contains the following provisions pertinent to our inquiry here:

Section 1 (Code Supplement Section 40-46). It is hereby declared to be the public policy of South Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization.

Section 2 (Code Supplement Section 40-46.1). Any agreement or combination between any employer and any labor organization whereby persons not members of such labor organization shall be denied the right to work for such employer or whereby such membership is made a condition of employment, or of continuance of employment by such employer, or whereby any such union or organization acquires an employment monopoly in an enterprise, is hereby declared to be against public policy, unlawful and an illegal combination or conspiracy.

Section 3 (Code Supplement Section 40-46.2). It shall be unlawful for any employer:

(a) To require any employee, as a condition of employment, or of continuance of employment, to be or become or remain a member or affiliate of any labor organization or agency;

(b) To require any employee, as a condition of employment, or of continuance of employment, to abstain or refrain from membership in any labor organization;

(c) To require any employee, as a condition of employment, or of continuance of employment, to pay any fees, dues, assessments or other charges or sums of money whatsoever to any person or organization.

* * *

Section 5 (Code Supplement Section 40-46.3). It shall be unlawful for any labor organization to enter into or seek to effect any agreement, contract or arrangement with any employer declared to be unlawful by Section 2 or Section 3 of this act (Code Supp. Sections 40-46.1 or 40-46.2).

““

* * *

Section 8 (Code Supplement Section 40-46.10). Any employer, labor organization or other person whomsoever who shall violate any provision of this act shall be guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be punished by imprisonment for not less than ten nor more than thirty days or by a

fine of not less than ten nor more than one thousand dollars or by both in the discretion of the court.

Section 9 (Code Supplement Sections 40-46.7, 40-46.8 and 40-46.9). Any person whose rights are adversely affected by any contract, agreement, assemblage or other act or thing done or threatened to be done and declared to be unlawful or prohibited by this act shall have the right to apply to any court having general equity jurisdiction for appropriate relief. The court, in any such proceeding, may grant and issue such restraining, and other, orders as may be appropriate, including an injunction restraining and enjoining the performance, continuance, maintenance or commission of any such contract, agreement, assemblage, act or thing, and may determine and award, as justice may require, any actual damages, costs and attorneys' fees which have been sustained or incurred by any party to the action, and, in the discretion of the court or jury, punitive damages in addition to the actual damages. The provisions of this section are cumulative and are in addition to all other remedies now or hereafter provided by law.

The defendant company contended that no cause
1 of action against it under the statute had been stated because the complaint failed to allege that plaintiff was discharged by reason of either membership or non-membership in the union. Analyzed, the argument is: (1) that the statute, being in derogation of freedom of contract, must be strictly construed; and (2) that since it does not expressly prohibit an agreement between the employer and the union whereby, as is alleged here, employment or continuance of employment is conditioned upon union referral or approval, its protection does not extend to the plaintiff's case. We think this contention unsound and that the circuit court erred in sustaining it.

Freedom of contract is subordinate to public policy; agreements that are contrary to public policy are illegal. 12 Am. Jur., Contracts, Section 167; *Grant v. Butt*, 198

S. C. 298, 17 S. E. (2d) 689. And where legislative intent to declare an act unlawful is apparent from consideration of the statute, it matters not that the prohibition of the act is not declared in specific language, for an act that violates the general policy and spirit of the statute is no less within its condemnation than one that is in literal conflict with its terms. 12 Am. Jur., Contracts, Section 160; *McConnell v. Kitchens*, 20 S. C. 430; *Fairly v. Wappoo Mills*, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215.

Here, the first section of the statute expressly declares it to be the public policy of this state that “the right of persons to work shall not be denied or abridged on account of membership or non-membership” in a labor union. But viewing that section in conjunction with the others before mentioned, particularly Section 2, it seems to us quite clear that the evils to which the legislative intent and the remedial purpose of the statute were directed were: (1) union control of employment on the one hand; and (2) employer boycott of, or insistence upon, union labor on the other. To hold that the prohibition was directed exclusively against requirement of union membership or non-membership as a condition of employment would be to disregard the prohibition, in Section 2, against agreements whereby the union acquires an employment monopoly, and to permit frustration of the legislative purpose by agreements such as the complaint here alleges, conditioning employment upon union referral or approval.

Section 2 of the Right to Work statute of Nevada prohibits “any agreement, written or oral, which excludes any person from employment or continuation of employment because of nonmembership in a labor organization”. St. Nev. 1953, c. 1, § 2. In *Building Trades Council of Reno and Vicinity v. Bonito*, 71 Nev. 84, 280 P. (2d) 295, 297, the court construed that section as prohibiting an agreement requiring an employer, before hiring craftsmen covered by it, to apply to the union to supply such craftsmen, and forbidding his employment of others unless the union should

be unable, within forty-eight hours, to supply such craftsmen. Rejecting as unrealistic the union's contention that said agreement was not one requiring employment of union members but merely an agreement on the part of the employer to designate the union as his employment agency, the court said: "By such a provision the employer, in practical effect, agrees that so long as the union is able to supply craftsmen, he shall employ only union labor. So long as the union is able to supply craftsmen, then, those not union members would be deprived of opportunity to obtain employment because of their nonmembership."

So also in *Sheet Metal Workers Local No. 175 v. Walker*, Tex. Civ. App. 1951, 236 S. W. (2d) 683, a clause substantially identical with that under consideration in the case last cited was construed as calling for a closed shop.

So far as the applicability of our statute is concerned, we can perceive no sound distinction between an agreement to hire only through the union and one to hire only such persons as have been cleared through or referred or approved by it. In either case it would be certain, as a practical matter, that only union members in good standing would be employed. In either case the "employment monopoly" forbidden by Section 2 of our statute would be assured.

The second ground of the demurrer is untenable.

3 That plaintiff participated in the walkout is not affirmatively shown, but on the contrary is expressly denied, in the complaint. The allegation is that the sole ground upon which the defendant company refused to continue his employment was non-approval by the union of such employment. If in fact he was discharged for another reason, that is a matter to be pleaded by way of answer, not demurrer.

What has been said in our discussion of the first
4 ground of the demurrer disposes also of the third and fifth grounds. The defendant company's freedom to hire and fire the plaintiff at its pleasure is subject to the

limitation, under our statute as we construe it, that neither the hiring nor the firing may be grounded or conditioned upon union membership or non-membership, referral or non-referral, approval or non-approval.

The issue of exclusive Federal jurisdiction, suggested by the fourth ground of the demurrer, was not passed upon by the court below, and is therefore not properly before us. *Carter v. Peace*, 229 S. C. 346, 93 S. E. (2d) 113; *Simonds v. Simonds*, 229 S. C. 376, 93 S. E. (2d) 107.

Reversed and remanded, with leave to the respondent to answer the complaint within twenty days after the filing of the remittitur.

STUKES, C. J., and TAYLOR, OXNER and MOSS, JJ., concur.

17740

W. F. BYARS, Respondent, v. CHEROKEE COUNTY, Appellant
(118 S. E. (2d) 324)

Action against a county for affirmation of the plaintiff's title to property which he had conveyed to the county and which it had reconveyed to him, under a condition subsequent in his deed, because the property was no longer used for a curing house. The Common Pleas Court of Cherokee County, Bruce Littlejohn, J., rendered a judgment for the plaintiff, and the defendant appealed. The Supreme Court, Moss, J., held that the county was bound to make the reconveyance, and that it was barred by laches and estoppel from repudiating it.

Affirmed.

1. FRAUD.—Fraud must be alleged to be used in defense.
2. FRAUD.—Fraud is never presumed, and evidence thereof must be clear, cogent and convincing.
3. FRAUD.—Fraud will not be presumed or implied where one acts within his legal rights.

4. DEEDS.—Cardinal rule in construing deed is to give effect to intention of parties unless it contravenes some well-settled rule of law or public policy.
5. DEEDS.—Provision in deed to county requiring reconveyance should county cease to use land for curing house was a “condition subsequent”, and when such use ceased grantor was entitled to reconveyance.

See publication Words and Phrases, for other judicial constructions and definitions of “Condition Subsequent”.

6. COUNTIES.—No enabling act was necessary to authorize county to reconvey property under condition subsequent in deed to county requiring reconveyance should county cease to use land for curing house.
7. COUNTIES.—County’s reconveyance of land, under condition subsequent in deed to county, because land was no longer used for curing house was neither void nor ultra vires.
8. COUNTIES—ESTOPPEL.—A County which had reconveyed to its grantor as required by condition subsequent in deed to it was barred by laches and estoppel from repudiating reconveyance in grantor’s action to affirm his title over seven years after reconveyance.
9. EQUITY.—“Laches” is neglect for unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.

See publication Words and Phrases, for other judicial constructions and definitions of “Laches”.

Harry L. Cline, Esq., of Gaffney, for Appellant, cites: As to County Board of Commissioners having no power to convey the property in question: 217 S. C. 247, 60 S. E. (2d) 586; 56 S. E. (2d) 723, 216 S. C. 52; 21 S. C. 414. As to rule that a Board of County Commissioners may exercise only such powers as are expressly conferred upon it, or which are necessarily implied from those expressed, and that where there is a reasonable doubt as to the existence of a particular power in the Board of County Commissioners, it must be resolved against the Board and the power denied: 66 Mont. 45, 212 P. 1105; 70 Mont. 84, 233 P. 916; 87 Mont. 83, 285 P. 195; 165 P. 297; 20 C. J. S., Counties, Secs. 4, 49; 217 S. C. 247, 60 S. E. (2d) 586. As to the doctrine of laches: 147 U. S. 120, 36 L. Ed. 911; 95 F.

(2d) 986; 23 S. E. (2d) 362, 201 S. C. 447; 2 S. E. (2d) 838, 190 S. C. 314; 101 S. E. (2d) 844, 223 S. C. 311.

Wade S. Weatherford, Jr., Esq., of Gaffney, for Respondent, cites: As to one of the first canons of construction of deeds being that the intention of the grantor must be ascertained and effectuated if no settled rule of law be contravened, and this intent must be found within the "four corners" of the deed: 132 S. C. 306, 128 S. E. 31; 193 S. C. 98, 7 S. E. (2d) 724; 206 S. C. 96, 33 S. E. (2d) 75; 16 Am. Jur. 528, Secs. 161, 162; 16 Am. Jur. 570, Sec. 237. As to there being sufficient testimony to sustain the finding of fact, concurred in by both Master and Circuit Judge, that the County is barred by laches and equitable estoppel: 210 S. C. 136, 41 S. E. (2d) 780; 19 Am. Jur. 340, 342; 211 S. C. 223, 44 S. E. (2d) 442.

January 30, 1961.

Moss, Justice.

In the Cherokee County Supply Act for the year 1945, approved March 14, 1945, 44 Stat. 745, there was appropriated the sum of \$2,500.00 to build a potato curing house in Lower Morgan Township. The Act further provided that the amount appropriated for the construction of the potato curing house should be expended by the A. A. A. Committee for said County and such Committee was authorized to purchase or receive as a gift a site therefor; the title to said property to be taken in the name of Cherokee County. In the 1946 Supply Act for Cherokee County, approved March 15, 1946, 44 Stat. 1935, there was an additional appropriation of \$672.52 to pay the balance due for the construction of such potato curing house.

It appears that pursuant to the foregoing authorization, a representative of the A. A. A. Committee of Cherokee County entered into negotiations with W. F. Byars, the respondent herein, for the purchase of a small tract of land containing .415 of an acre for the site of the potato curing house, and that an agreement was reached whereby the

respondent executed and delivered to Cherokee County, the appellant herein, a deed for the small tract of land for a consideration of \$50, which said deed was dated August 17, 1945, and duly recorded in the office of the Clerk of Court for Cherokee County in Deed Book 2-Q, at page 198. This deed, pursuant to an agreement, contained the following proviso:

"Provided, that in case the said lot of land shall cease to be used by the County of Cherokee for curing house purposes that the said Forest Byars shall have the right to repurchase the said lot of land and have same reconveyed to him upon the payment of the said purchase price of \$50.00, Cherokee County to have the right to remove therefrom at that time, any improvements placed on the said land if desired."

The record shows that the A. A. A. Committee of Cherokee County constructed upon this small lot of land a cement block potato curing house. This building was completed in November, 1945. The cost of construction was paid by Cherokee County from the appropriation made in the 1945 and 1946 Supply Acts. It is undisputed that the said lot of land and the building erected thereon ceased to be used by the County of Cherokee for curing house purposes in the spring of 1947. The respondent testified that it was then that he asked the county to reconvey the property to him as was provided in this deed of conveyance to the county.

It further appears that at a regular meeting of the Supervisor and the County Board of Commissioners held on September 5, 1950, a resolution was passed directing the sale of the potato curing house at public auction at 11:00 o'clock A. M. September 16, 1950. Pursuant to such authorization there was placed in the Gaffney Ledger the following advertisement:

"For Sale—Potato house in Macedonia Community to highest bidder on September 16, at 11:00 A. M."

It appears that at the appointed time the potato curing house was sold at public auction to one Claud Philips for the sum of \$70.00. The sale was held in front of the potato curing house and the auction was conducted by the Clerk of the County Board of Commissioners of Cherokee County. The purchaser sold the potato curing house building to one Roy Byars and the respondent purchased the building from the said Roy Byars.

It further appears that at a meeting of the Supervisor and the County Board of Commissioners held on October 3, 1950, a resolution was unanimously adopted reciting that the appellant had purchased from the respondent, on August 17, 1945, the lot of land herein referred to, for the sum of \$50.00, upon condition that should the county ever cease to use the same for potato curing house purposes, that it would reconvey the same to W. F. Byars for \$50.00. The resolution further recited that the county had ceased to use the said lot for the purposes aforesaid and directed the County Supervisor and the Clerk of the Board to execute a deed conveying the said premises to the respondent, in compliance with the condition contained in said deed. Pursuant to, and in compliance with said resolution, the appellant did by deed dated October 3, 1950, and recorded in the office of the Clerk of Court for Cherokee County, in Deed Book 3-V, at page 466, reconvey the said small tract of land to the respondent, he having repaid the county \$50.00, the original purchase price thereof.

The record shows that the respondent, from the time of the purchase of the potato curing house and the lot upon which it stood, used it continuously in his farming and orchard operations until October 9, 1957, at which time the State Highway Department condemned the said building and lot of land for highway purposes and made an award of \$1,554.00 for the lot of land and building thereon. On October 29, 1957, the Comptroller General of South Carolina issued a check for the amount of the condemnation award payable jointly to the respondent and the appellant.

The respondent instituted this action against the appellant seeking to have the Court affirm his title to the potato curing house and the lot of land upon which it was located, and to adjudicate that he alone was entitled to the proceeds of the highway condemnation award. It is the position of the appellant that the County Board of Commissioners for Cherokee County had no authority to sell the potato curing house building or to execute a deed to the property in question, their acts in so doing being void and *ultra vires*. It is further asserted that the conduct of the respondent and the County Board of Commissioners constituted a fraud upon the taxpayers of Cherokee County.

The issues made by the pleadings were referred to the Honorable Leroy Moore, as Special Referee, to take the testimony and to report his conclusions of fact and law. After the trial of the case before the said Special Referee, he filed his report, recommending that the Court issue its order declaring that the respondent was the sole and absolute owner of the potato curing house and lot at the time of the condemnation thereof by the State Highway Department, and also finding that the respondent was entitled to the proceeds of the condemnation award. The appellant excepted to this report and the matter was heard before the Honorable Bruce Littlejohn, Resident Judge of the Seventh Circuit, who, by his decree, dated October 16, 1959, overruled all of the exceptions and affirmed the said report. This appeal followed.

The appellant alleges that the sale of the potato curing
1-3 house by the County Board of Commissioners and
the sale and reconveyance of the lot of land in question by the said Board was a fraud upon the taxpayers of Cherokee County. The appellant asserts that the respondent and the County Board of Commissioners knew, or should have known, that the said premises were to be included within the right-of-way of a new highway, and that by reason of such knowledge, the conveyance of the property to the respondent constituted a fraud. Fraud must be alleged

before one can have the advantage of a defense based thereon. *Marston v. Rivers et al.*, 138 S. C. 295, 136 S. E. 222. We will assume, for the purpose of this appeal, that the answer of the appellant sufficiently alleged fraud as a defense. However, fraud is never presumed and evidence of it must be clear, cogent and convincing. *Blackmon v. United Ins. Co.*, 235 S. C. 335, 111 S. E. (2d) 552. We find nothing in the evidence in this case from which fraud on the part of the respondent or the County Board of Commissioners might reasonably be inferred. When the respondent conveyed to the appellant the tract of land here involved, it was provided in such conveyance that should the appellant cease to use the said land for curing house purposes, then the respondent would have the right to repurchase the said lot of land and have the same reconveyed to him upon the payment of the purchase price of \$50.00. When the respondent obtained a reconveyance of the property in question, in accordance with the condition stated in his deed to the appellant, he was acting within his legal rights. When the County Board of Commissioners of Cherokee County reconveyed the property to the respondent, it was acting in accordance with the condition contained in the deed under which the county obtained title to the property in question. Where one acts within his legal rights, fraud will not be presumed or implied. *Mishoe v. General Motors Acceptance Corporation*, 234 S. C. 182, 107 S. E. (2d) 43.

What is the proper construction of the deed from
4 the respondent to the appellant, which conveyed the lot in question with the condition therein as is hereinabove set forth? In construing a deed, it is elementary that the cardinal rule of construction is to ascertain and effectuate the intention of the parties, unless that intention contravenes some well-settled rule of law or public policy. *Davis et al v. Davis et al.*, 223 S. C. 182, 75 S. E. (2d) 46; *Grainger et al. v. Hamilton et al.*, 228 S. C. 318, 90 S. E. (2d) 209.

The testimony shows that the respondent owned a farm in Cherokee County and a member of the A. A. A. Committee of Cherokee County approached him for the purpose of purchasing a small tract of land so that a potato curing house could be erected thereon. The respondent testified that it was agreed that if the county should cease to use the property for a potato curing house, then the respondent would have the right to repurchase the property for the sum of \$50.00. This agreement was incorporated in the deed. The respondent was the absolute owner of his land and he had the legal right to sell it under such conditions as he might impose in the deed. If the appellant did not wish to purchase the said tract of land with the condition imposed, it should not have consummated the purchase. The respondent in this case had the right to say in his deed that the property conveyed should be devoted to a particular purpose and that he should have the right to repurchase the same if it was not used for such purpose. It was the clear intent of the grantor to convey the lot of land in question to the appellant with the condition as is therein stated that he would have the right to repurchase the same if the appellant ceased to use the property for potato curing house purposes. No other intention can be reached from the language used. It was likewise the clear intention of the grantor that if the appellant ceased to use the property for a potato curing house, then the appellant would have a right to remove therefrom, at the time of the reconveyance of the land to the respondent, any improvements placed on the land, if the appellant so desired.

It is crystal clear that the appellant was purchasing
5 the lot in question for the purpose of erecting thereon
a potato curing house. It is equally clear that the respondent conveyed to the appellant the lot of land for such purpose, and attached thereto a reasonable condition that he would have the right to repurchase such lot of land if the appellant ceased to use the land for the purpose for which it was purchased. Since it is an admitted fact that appellant

had ceased to use the building upon the land for a potato curing house, the event which gave the respondent the right to repurchase the land had happened, and this contractual provision in the deed became operative. The appellant was bound to the performance of such. In the case of *White v. Brittin*, 75 S. C. 428, 56 S. E. 232, 234, it is said:

“* * * The right of a grantor to say in his deed that the property conveyed shall be devoted to a particular purpose and that it shall revert to his estate when not so used, should be fully recognized and protected, yet, as the law does not favor forfeitures, before the Courts will declare one, a breach of the conditions of the deed must be clearly proved.”

In the case of *Trustees of University of South Carolina v. City of Columbia*, 108 S. C. 244, 93 S. E. 934, it was held that where land was conveyed to an incorporated Fire Company to occupy, use and enjoy the premises during the term of its corporate existence, to revert, in case the corporation should become extinct or forfeit its charter, title to the land reverted to the grantor when the company became extinct and ceased to fight fires.

In *Hammond v. Port Royal & Augusta Ry. Co.*, 15 S. C. 10, it was held that where a deed conveyed a strip of land to a railroad company, to them, their successors and assigns forever, “provided always, and this deed is upon the express condition” that a certain system of drainage was to be kept up by the railroad company, the Court held that this created a condition subsequent in the deed, and voidable by the grantor upon condition broken.

The condition stated in the deed in this case, giving the grantor by the express words used, the right to a reconveyance of the property should the appellant cease to use the land for curing house purposes, is a condition subsequent, and upon the happening of the event stated entitled the grantor to a reconveyance of the property. A condition subsequent is one annexed to an estate already vested, by the performance of which such estate is kept and continued, and by the

failure or nonperformance of which it is defeated; or it is a condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition. Black's Law Dictionary, Third Edition, page 390.

The appellant earnestly argues that the case of
6 *Williams et al. v. Wylie et al.*, 217 S. C. 247, 60 S. E. (2d) 586, 21 A. L. R. (2d) 717, is applicable and is authority for holding that the reconveyance made by the Supervisor and Board of County Commissioners to appellant was null and void. They assert that an enabling act is necessary to authorize the sale of county property. We do not think that the doctrine in the cited case is here applicable for the reason that the appellant obtained a deed on condition to the parcel of land when it was acquired. The county was bound by the condition in the deed that upon the discontinuance of the use of the property for potato curing purposes, respondent, under the terms of the conveyance, had the right to a reconveyance thereof.

The act of the Supervisor and the County Board of
7 Commissioners reconveying to the respondent the tract of land in question was neither void nor *ultra vires*. It was the fulfillment and the performance of a condition stated in the deed by which the appellant obtained title to the property in question.

The trial Judge affirmed the holding of the Special
8 Referee that the appellant had been guilty of laches and was now estopped to question the deed by which a reconveyance of the property was made by the appellant to the respondent. The testimony shows that on October 3, 1950, appellant reconveyed the lot in question to the respondent. The appellant has taken no action to question this deed or to have it set aside. The county also took positive action to dispose of the potato curing house located upon the premises before the reconveyance of the land and actually sold the building at public auction. The appellant asserts that the

building was not properly advertised because it was not stated where the sale would take place nor who the seller was. It is crystal clear from the record that the county took no legal action against the respondent concerning the reconveyance of the property, or the sale of the potato curing house thereon, until the respondent brought this action. We think the doctrine of laches and equitable estoppel was available to the respondent against the position taken by the appellant.

In the case of *Powell v. Board of Commissioners of Police Insurance & Annuity Fund of State*, 210 S. C. 136, 41 S. E. (2d) 780, 782, 1 A. L. R. (2d) 330, it was held:

"But we think the case turns upon a narrower point. It is that respondent's right arises from contract, the original authority and binding force of which is unquestioned, and granting that it was the State itself which voluntarily entered the relationship as the other contracting party, it may be subject to the doctrine of estoppel in its contract relations. The rule is a well established one in American courts generally. 19 Am. Jur. 819; 49 Am. Jur. 298; 31 C. J. S., Estoppel, § 138, p. 403 *et seq.*; *State of Washington ex rel. Washington Paving Co. v. Clausen*, 90 Wash. 450, 156 P. 554, L. R. A. 1917A, 436. The following is from 31 C. J. S., Estoppel, § 140, p. 411, with numerous supporting citations in the footnotes: 'It has been broadly stated that there can be no estoppel against the United States or a state. Nevertheless, subject to limitations and exceptions * * * it is well established that in a "proper case" the doctrine of equitable estoppel may apply as against the federal and state governments, and that under circumstances which would estop a private individual an estoppel may be asserted against the United States, a state, or a state agency, commission, or officer'."

The case of the *State v. Simring et al.*, 230 S. C. 49, 94 S. E. (2d) 9, was an action by the State to estreat an appearance recognizance, and this Court had for decision the question of whether the State was estopped to assert that the

condition of the recognizance was breached. We held that the right of the State arose from contract and was, therefore, subject to the doctrine of estoppel.

Laches is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done, or neglecting or omitting to do what in law should have been done for an unreasonable and unexplained length of time and in circumstances which afforded opportunity for diligence. *De Laine et al. v. De Laine et al.*, 211 S. C. 223, 44 S. E. (2d) 442. In order that the defense of laches may be sustained, the circumstances must have been such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts. *Selden v. Kennedy*, 104 Va. 826, 52 S. E. 635, 4 L. R. A., N. S., 944.

We think that the lower Court properly, under the facts and circumstances here revealed, applied the doctrine of laches and equitable estoppel. It is an admitted fact that the use of the building upon the lot in question for potato curing purposes was abandoned in 1947. A witness for the appellant testified that it was not practical to remove the building from the land because it was constructed of concrete blocks. The County Board of Commissioners of the appellant took the initiative in disposing of the building by sale at public auction. If there was any defect in such sale because of failure to properly advertise the same, such was the fault of the appellant, and we think that the lower Court properly held that it was too late to question any irregularities in the sale of the building, particularly in view of the fact that the respondent had no part in disposing of the potato curing house building. We think that the facts as found by the Special Referee and affirmed by the Circuit Judge amply support the conclusion that the appellant is now barred by laches and equitable estoppel to repudiate the sale of the potato curing house building and the reconveyance of the land to the respondent.

The exception of the appellant is overruled and the judgment of the lower Court is affirmed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, JJ.,
concur.

17741

Fred A. DEESE, Respondent, v. J. N. WILLIAMS and South Carolina
State Highway Department, of which South Carolina Highway
Department is Appellant
(118 S. E. (2d) 330)

Action for injuries sustained by plaintiff when his automobile was struck by a state highway department truck after the truck was hit in the rear by a trailer-truck. The Common Pleas Court, Kershaw County, John Grimball, J., entered judgment for plaintiff, and the state appealed. The Supreme Court, Oxner, J., held that the evidence presented a jury question as to whether the plaintiff's injuries were caused by joint negligence of operator of the trailer-truck, in driving too fast, and by joint negligence of employee of the state in stopping the state's truck 200 feet below the crest of a hill in such a manner that the highway was completely blocked.

Affirmed.

1. AUTOMOBILES.—Evidence presented a jury question as to whether injuries sustained by plaintiff when his automobile was struck by a State Highway Department truck after the truck was hit in the rear by a trailer-truck were caused by negligence of operator of trailer-truck in driving too fast, and by joint negligence of employee of the state in stopping the state's truck 200 feet below the crest of a hill in such a manner that the highway was completely blocked.
2. AUTOMOBILES.—Negligence of the Highway Department in blocking a highway with a truck, during course of plowing operations, constituted negligence directly connected with the operation of the truck, and an action could be maintained against the state based on such negligence. Code 1952, § 33-229.
3. TRIAL.—The state, upon failure to object to form of verdict apportioning damages between it and another joint tort-feasor, waived

the right to object to the form of the verdict even if a jury did not have the power to apportion damages.

4. STATES.—State would not be considered prejudiced by verdict of jury awarding plaintiff \$8,000.00 against state and \$2,000.00 against other joint tort-feasor, where the state could have been sued severally, and except for statutory limitation on recovery would have been liable for full amount of actual damages sustained.

Messrs. Daniel R. McLeod, Attorney General, and Benjamin B. Dunlap, Assistant Attorney General, of Columbia, for Appellant, cite: As to there being no actionable negligence on the part of the defendant, South Carolina Highway Department: 183 S. C. 155, 190 S. E. 499; 212 S. C. 224, 47 S. E. (2d) 306; Am. Jur., Highways, Sec. 411; 183 S. C. 155, 190 S. E. 499; 185 S. C. 463, 196 S. E. 188; 209 S. C. 125, 39 S. E. (2d) 198; 106 F. Supp. 886; 131 A. L. R. 558, 10 S. E. (2d) 503 (Va.); 24 S. E. (2d) 121, 202 S. C. 73; 37 S. E. (2d) 737, 208 S. C. 267; 48 S. E. (2d) 324, 212 S. C. 485; 25 Am. Jur., Highways, Secs. 239, 412. As to proximate cause of plaintiff's injuries being due to intervening acts of a third party, and not the acts of this Defendant: 2 S. E. (2d) 790, 190 S. C. 309; 106 F. Supp. 886; 8 S. E. (2d) 321, 193 S. C. 309; 24 S. E. (2d) 121, 202 S. C. 73; 28 S. E. (2d) 412, 203 S. C. 518; 48 S. E. (2d) 324, 212 S. C. 485. As to the verdict of the jury being excessive, arbitrary, capricious, not warranted by the evidence and contrary to the law: 42 S. E. (2d) 705, 210 S. C. 357. As to where two defendants are sued as joint tort-feasors, there can be no apportionment of actual damages: 8 A. L. R. (2d) 862; 140 S. E. 443, 142 S. C. 125; 1 S. C. L. 11; 155 S. E. 273, 158 S. C. 161. As to where a verdict is illogical, motion for new trial is proper remedy: 216 S. C. 424, 58 S. E. (2d) 685.

Messrs. Murchison, West & Marshall, of Camden, for Respondent, cite: As to there being actionable negligence on the part of defendant, South Carolina Highway Department, as contemplated by Section 33-229 of the Code of Laws, 1952: 208 S. C. 208; 189 S. C. 310, 1 S. E. (2d) 188; 25

Am. Jur., Highways, Sec. 411; 4 Blashfield's Cyclopedic of Auto Law and Practice, Sec. 2642, Proximate Cause, Ck. 71, 1959 Pocket Part; 208 S. C. 267, 37 S. E. (2d) 736. *As to negligence of South Carolina Highway Department being the proximate cause of the accident:* 25 Am. Jur., Highways, Sec. 412; 208 S. C. 267, 37 S. E. (2d) 737. *As to the verdict of the jury being proper, and even had it been improper, appellant has waived its right to object to it:* 2 McMullen 184; 1 Bay 15; 113 S. C. 151, 101 S. E. 832; 158 S. C. 151, 155 S. E. 273; 130 S. C. 180, 125 S. E. 912; 217 S. C. 180, 60 S. E. (2d) 88.

January 31, 1961.

OXNER, Justice.

This is an action to recover damages for personal injuries alleged to have been sustained as a result of the joint negligence and recklessness of the agents and servants of J. N. Williams and the State Highway Department. The case was previously before this Court on a question of venue. *Deese v. Williams [and South Carolina Highway Department]*, 236 S. C. 292, 113 S. E. (2d) 823. The trial resulted in a verdict in favor of plaintiff against the Highway Department for \$8,000.00 actual damages, and against Williams for \$2,000.00 actual damages and \$2,000.00 punitive damages. From the judgment entered on the verdict, only the State Highway Department has appealed.

The first question presented is whether the Court below erred in refusing a motion by appellant for a nonsuit and later for a directed verdict upon the grounds (1) that there was no proof of actionable negligence on its part and (2) that even if any negligence was shown, it was not of that character for which consent to sue the State is given by Section 33-229 of the 1952 Code.

Respondent's injuries resulted from a collision of three motor vehicles—an automobile which he was driving, a truck of appellant, and a truck of defendant J. N. Williams

—which occurred about eight o'clock on the morning of December 11, 1958, at a point on U. S. Highway No. 521 about twelve miles north of Lancaster, South Carolina. It had been snowing for some time. Respondent and another man were returning home from work, driving in a southerly direction. As they went up a hill, they came upon a car stopped on their side of the asphalt highway. Ahead of this car was a truck of appellant with a snow plow attached which was clearing snow off the highway. The driver had difficulty getting up the hill and several of appellant's employees were pushing the truck. While this was being done, respondent's car, which was about 200 feet from the crest of the hill, and the car immediately ahead of him remained stationary. Respondent was afraid to go around this car and appellant's truck because of the danger of some vehicle traveling in the opposite direction coming over the crest of the hill. As he sat in his car, appellant's truck proceeded up the hill to a point about 100 feet from the crest, where it was driven into a driveway on the western side of the road and the snow dumped. It was then backed into the highway and driven down the hill at a speed of about four or five miles an hour. When within five or six feet of respondent's car, it stopped. Just prior to this time, one of appellant's employees had gone up the hill to warn oncoming traffic. (Although according to respondent's witnesses he had no flag, for convenience he will be referred to as the flagman.) While he was standing about 75 or 100 feet from the crest of the hill, a trailer-truck belonging to Williams, loaded with about fifty or sixty thousand pounds of grain, traveling in a northerly direction, came over the hill at a speed variously estimated as between 35 and 50 miles an hour. The flagman waved his hands in an endeavor to stop the Williams truck but due to the condition of the road, the driver was unable to do so and in an effort to avoid the accident, pulled to the right and struck the right rear of appellant's truck, knocking it into the left front and side of the automobile in which respondent sat.

The foregoing summary is taken from respondent's testimony. However, that of appellant differed in only two material particulars. The flagman testified that he was standing at the crest of the hill when the Williams truck approached and that he endeavored to stop it by waving a red flag. There is also a further dispute as to whether appellant's truck was standing when hit or moving very slowly, appellant's testimony being to the effect that it had not stopped.

Assuming as true the testimony offered by respondent, as we are required to do in determining whether there was error in refusing the motions for nonsuit and directed verdict, we think it may be reasonably inferred that appellant was negligent in failing to give northbound traffic adequate warning of the danger created by stopping its truck 200 feet below the crest of the hill. With this truck standing on the eastern side of the road and respondent's car standing almost opposite it on the western side, the highway was completely blocked. It could be reasonably found that this blocking of the highway could have been avoided if appellant's truck had been stopped at a point where northbound traffic could have passed around it. It was for the jury to say whether in the exercise of ordinary care, the employees of appellant should have anticipated the possibility of a vehicle going north coming over the hill and being unable to stop in time to avoid a collision. According to the testimony offered by respondent, the flagman instead of going to the crest of the hill, left his red flag in the truck and proceeded to wave his hands while standing 75 or 100 feet below the crest. There was also testimony to the effect that appellant had such signs as "men working", but they were not used on this occasion.

It is also argued that the Williams truck was traveling at such speed that the driver could not have stopped in time to avoid the collision even if adequate warning had been given. But the testimony shows that if the flagman had gone to the brow of the hill, he could have seen the Williams truck approaching for a distance of a quarter of a mile, which would have afforded an opportunity to give timely warning.

Nor do we find any merit in appellant's contention

1 that the undisputed testimony shows that the chain of causation was broken by negligent and reckless conduct on the part of the driver of the Williams truck. "The intervening negligence of a third person will not excuse the first wrongdoer, if such intervention ought to have been foreseen in the exercise of due care. In such case, the original negligence still remains active, and a contributing cause of the injury. The test is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of events subsequently arising." *Locklear v. Southeastern Stages, Inc.*, 193 S. C. 309, 8 S. E. (2d) 321, 325. The testimony in this case justifies an inference that the conduct of appellant's employees was a substantial factor in bringing about the collision with respondent's car and that the accident would not have happened in the absence of negligence on the part of appellant. Assuming that the driver of the Williams truck was negligent and reckless as found by the jury, this fact would not relieve appellant from liability, if the jury found, as we think they could have reasonably done, that the negligence of appellant concurred as a proximate cause of respondent's injuries. *Brown v. National Oil Co.*, 233 S. C. 345, 105 S. E. (2d) 81. Our conclusion that the question of whether the respondent's injuries were caused by the joint negligence of both defendants was properly submitted to the jury is fully supported by *Ayers v. Atlantic Greyhound Corporation*, 208 S. C. 267, 37 S. E. (2d) 737.

The only other question raised in connection with the refusal of appellant's motion for a directed verdict is whether the immunity of the State from suit has been waived in an action of this kind. The statute, Section 33-229 of the 1952 Code, permits suit for actual damages to be brought against the Highway Department by "any person who may suffer injury to his person or damage to his property by reason of (a) a defect in any State Highway, (b) the negligent repair of any State Highway or (c) the negligent operation of any

vehicle or motor vehicle in charge of the State Highway Department while such vehicle or motor vehicle is actually engaged in the construction or repair of any of such highways. * * *.” Under this statute, as amended, recovery for personal injuries may not exceed \$8,000.00. (We are not now concerned with the amendments to this statute made after the occurrence of the accident out of which this case arises.)

It seems quite clear that this truck was actually engaged in the repair of a highway. *Robinson v. State Highway Department*, 159 S. C. 405, 157 S. E. 136; *Greer v. State Highway Department*, 160 S. C. 510, 159 S. E. 35; *Heidt v. State Highway Department*, 189 S. C. 310, 1 S. E. (2d) 188. It is argued, however, that the real negligence, if any, of appellant concerned not the operation of the truck but the failure to provide adequate warning, which appellant says is not included under Section 33-229. This contention overlooks the fact that the blocking of the highway by the truck gave rise to the duty to provide adequate warning and the discharge of this duty was directly connected with the operation of the truck. It was held in *Smook v. Charleston County*, 128 S. C. 379, 122 S. E. 862, that although many kinds of temporary obstructions to a highway are permissible, “the permissibility is limited by the duty of removing them within a reasonable time and of taking such precautions against collisions in the meantime as prudence and the safety of travelers would suggest”, and that the failure of a county to perform this duty subjects it to liability for a defect in the highway. In *Epps v. South Carolina State Highway Department*, 209 S. C. 125, 39 S. E. (2d) 198, it was held that it is the duty of the Department to keep its highways in a reasonably safe condition for travel and to erect and maintain such signs and warnings as may be reasonably necessary to enable users of the highways, exercising ordinary care and prudence, to avoid injury to themselves and others. We think under these authorities that this case comes within the provisions of Section 33-229.

Before concluding our discussion of this phase of the case, it should be stated that in an action of this kind the plaintiff must allege and prove absence of contributory negligence. Section 33-232. But it is conceded that there was no negligence on the part of respondent.

We now turn to the attack made by appellant upon the form of the verdict. It is contended that the jury sought to apportion the damages between the two defendants which is not permitted and that the verdict is illogical and not responsive to the Court's instructions. For these reasons it is said that the Court should have set aside the verdict and granted appellant's motion for a new trial. Respondent says our decisions allow a jury to apportion damages between joint tort-feasors and further that the appellant waived any right it may have had to object to the form of the verdict.

When the verdict was published by the Clerk, the following occurred:

"The Court: Now, gentlemen, counsel for the various parties, as you understand, that is not precisely in the form in which I instructed the jury to bring the verdict in. Do you have any question about the manner in which the verdict is written?

"Mr. West (Attorney for plaintiff): We don't, sir. As we understand it, it's a total verdict of \$12,000.00, \$8,000.00 against the Highway Department and \$4,000.00 against the defendant Williams?

"The Court: That's my understanding of it, but if that's not correct, or if anybody has any question about it, I will give it back to the jury with proper instructions to reform it.

"Mr. Moise (Attorney for Williams): As we understand the verdict, it's a verdict against J. N. Williams for \$2,000.00 actual damages, and \$2,000.00 punitive.

"The Court: Is that the way you understand it, Gentlemen?

"Mr. deLoach, Sr. (Attorney for Highway Department): We understand it, your Honor.

"The Court: All right, sir, there is no question about it then?

"Mr. deLoach, Sr.: I don't think we have any question, your Honor.

"The Court: You have no question about it?

"Mr. deLoach, Sr.: No, sir."

After making the foregoing inquiries the trial Judge received the verdict. No objection thereto was made by appellant until some time later when the motion for a new trial was argued.

It was held in the early case of *White v. McNeily*, 1 Bay 11, contrary to the rule at common law, that where joint tort-feasors are sued, the jury may sever the actual damages and apportion them. Although Judge O'Neill said in *Smith v. Singleton*, 2 McMul. 184, that the wisdom of such departure is "very questionable", the authority of *White v. McNeily* has been recognized in a number of later cases. *Rhame v. City of Sumter*, 113 S. C. 151, 101 S. E. 832; *Jenkins v. Southern Railway Co.*, 130 S. C. 180, 125 S. E. 912; *Johnson v. Atlantic Coast Line Railroad Co.*, 142 S. C. 125, 140 S. E. 443. Actual damages were apportioned in *Miller v. Atlantic Coast Line Railroad Co.*, 140 S. C. 123, 138 S. E. 675 and *Campbell v. Hill*, 158 S. C. 151, 155 S. E. 273, and apparently no question thereabout was raised. We know of no other Court which, in the absence of statutory authorization, permits the apportionment of damages between joint tort-feasors.

Notwithstanding the fact that the unique rule laid down in *White v. McNeily* has been generally recognized by the Bench and Bar as the settled law of this State, appellant says it is unsound and illogical and should no longer be followed. But the question as to whether the foregoing decision and those following it should be overruled at this late date need not now be decided. For the purpose of this case, we shall assume that in a suit against several defendants on a joint tort, a jury is not empowered to sever the actual damages

and assess each defendant according to the degree of his culpability.

Even in those jurisdictions denying the power of the jury to apportion damages between joint tort-feasors, it is generally held that when a jury does so, the verdict is not void but only erroneous in form. *Whitney v. Tuttle*, 178 Okl. 170, 62 P. (2d) 508, 108 A. L. R. 789; *Aitken v. White*, 93 Cal. App. 134, 208 P. (2d) 788; 52 Am. Jur., Torts, Section 123. And when, as here, no objection is made when such a verdict is published and counsel for all parties acquiesce in its form, it is too late to make a complaint after the jury is discharged. By failing to make timely objection, the irregularity in the form of the verdict is waived. In *Schuman v. Chatman*, 184 Okl. 224, 86 P. (2d) 615, 617, the Court said:

"We shall next consider the improper action of the jury in apportioning the damages between the joint tort-feasors. Admittedly it was improper for the jury to have attempted the apportionment. Such a verdict should not be reversed. It should have been returned to the jury for amendment or correction. However, in this case it was received and no objection to its receipt made. In this state such verdicts are not void even where as in this case a sum in gross is not assessed against both defendants. * * *, a new trial should not be granted where, as in this case, the verdict has been received without objection. Indeed the absence of such objection relieves the court of the responsibility of attempting by reformation to preserve a right which a party did not at the appropriate time deem of sufficient moment to warrant an objection. The judgment of the trial court in this case will not be disturbed by reason of the form of the verdict upon which it is based."

Support of the foregoing view as to waiver will also be found in the decisions of this Court. In *Rhame v. City of Sumter*, *supra*, 113 S. C. 151, 101 S. E. 832, 833, plaintiff sought to recover damages resulting from the alleged joint

negligence of one Forshee and the City of Sumter. The jury returned a verdict of \$425.00 actual damages against each defendant. No objection to the form was made when it was published. On appeal by the city, the judgment entered on that verdict was affirmed. While the major question discussed by the Court related to the construction of the verdict, there being a dispute as to whether there was a joint verdict for \$425.00 or a separate verdict against each defendant for \$425.00, the transcript of record shows that the exceptions squarely raised the question of whether the city waived any irregularity in the verdict. Exception 6 was to the effect that the verdict as rendered was contrary to the charge in that the jury had been instructed to bring in a joint verdict if they found both defendants liable. By Exception 8 it was contended that there was no basis for the apportionment of the verdict. Exception 10 in that case was as follows: "His Honor erred in holding that the objections to the form of the verdict came too late; whereas, His Honor should have held that the motion was timely and that the objections went to the substance as well as the form of the verdict." In the course of an opinion overruling these and other exceptions, the Court said:

"While the verdict is unusual, no effort was made to correct it before the jury had separated. His Honor would have done so had he been requested to find out just what the jury meant, and had the verdict reformed. * * * The defendant's counsel made no attempt to find out what the jury intended, and their objections come too late. It was their business to clarify and ask for a correction and reformation of verdict before the jury were discharged."

In *McAlister v. Thomas & Howard Co.*, 116 S. C. 319, 108 S. E. 94, 95, the jury, in disregard of the Court's instructions, found a general verdict of \$2,500.00. A new trial was sought "on the ground that verdict was not responsive to the instructions, in that the verdict does not state whether it is for actual damages, or punitive damages, or for how much actual or how much punitive damages." It was held

that it was the duty of the defendant's attorney to have called attention to the irregularity in the form of the verdict when it was published and by failing to do so, defendant waived any right to complain.

In *Bethea v. Western Union Telegraph Co.*, 97 S. C. 385, 81 S. E. 675, which was an action to recover actual and punitive damages for delay in the delivery of a telegram, the jury returned a verdict for punitive damages only in the sum of \$250.00. After the jury was discharged, the defendant attacked the verdict and asked that it be set aside on the ground that it showed that no actual damages had been sustained. The refusal of the trial Judge to set it aside was affirmed. The Court held that the irregularity, if any, was waived by failure of counsel to make an objection before the jury separated.

The foregoing and other cases were reviewed in *Limehouse v. Southern Railroad Co.*, 216 S. C. 424, 58 S. E. (2d) 685, 688. It was there stated: "It is well established that where a verdict is objectionable as to form, the party who desires to complain should call that fact to the Court's attention when the verdict is published. Otherwise, the right to do so is waived."

We conclude that appellant waived any right to object to the form of this verdict. We do not think a party should be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence.

Finally, it is claimed that the sum of \$8,000.00 found against appellant is excessive and wholly disproportionate to its culpability. It is not contended that respondent's injuries did not justify the recovery of \$10,000.00 actual damages but that the severance of damages made by the jury was arbitrary, capricious, and contrary to the evidence in that the driver of the Williams truck was negli-

gent in a much greater degree than appellant's employees. It may first be stated that under the evidence there may be a reasonable difference of opinion as to the relative culpability of the parties. We do not know whether the jury found recklessness on the part of the appellant's employees because they were properly instructed that punitive damages could not be awarded against appellant. Then, too, there is a serious doubt as to whether the precise question now argued is raised by the exceptions. But apart from these considerations, the contention now made cannot be sustained because of lack of prejudice.

The verdict clearly shows that the jury found that the plaintiff had sustained actual damages in the sum of \$10,000.00 as a result of the joint negligence of the two defendants. In fact, it is stated in the order of the trial Judge that the jury first wrote the following verdict: "We find for the plaintiff \$10,000.00 actual damages and \$2,000.00 punitive damages." Subsequently this verdict was marked "void" and the one now under consideration entered. Of course, under the statute recovery against the Highway Department could not have exceeded \$8,000.00 but except for this, under the finding of the jury that respondent's injuries were caused by the joint and concurrent negligence of the defendants, both would be liable for the full amount of actual damages sustained. It is quite clear that appellant has not been hurt by the failure of the jury to award a greater amount against Williams. Appellant might have been sued severally and the smaller verdict against Williams does not relieve it of its own liability as determined by the jury. This conclusion is fully sustained in a well considered opinion by Judge Parker in *Ohio Valley Bank v. Greenebaum Sons Bank & Trust Co.*, 4 Cir., 11 F. (2d) 87. Also, see *Siebrand v. Gosnell*, 9 Cir., 234 F. (2d) 81, and cases therein cited.

Affirmed.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

17742

Fred W. FULLER, Administrator of the Estate of Mildred L. Fuller,
Respondent, v. James C. BAILEY, Appellant

(118 S. E (2d) 840)

Action by an administrator against the host driver of an automobile for the wrongful death of a guest. The Common Pleas Court, Charleston County, Bruce Littlejohn, J., denied the host's motion for a judgment *non obstante veredicto* and granted the administrator's motion for a new trial on the ground of inadequate damages, and the host appealed. The Supreme Court, Moss, J., held that the questions of whether the host was driving the automobile at the time of the fatal accident, and whether he was guilty of heedlessness and recklessness with respect to the operation of the vehicle, were for the jury, and that the granting of a new trial on the ground that the verdict was grossly inadequate was not an abuse of discretion.

Affirmed.

1. AUTOMOBILES.—Under automobile guest statute, liability is restricted to injury or death from intentional, heedless or reckless misconduct of owner or operator. Code 1952, § 46-801.
2. APPEAL AND ERROR.—In passing on appellant's exceptions to refusal of trial judge to grant motions for nonsuit, directed verdict, or judgment *non obstante veredicto*, Supreme Court will view evidence and inferences fairly deducible therefrom most favorably to respondent.
3. AUTOMOBILES.—Whether host was driving and was heedless and reckless when automobile left highway on curve and knocked top out of pine tree over nine feet off ground, killing guest, was for jury. Code 1952, § 46-801.
4. TRIAL.—If more than one reasonable inference can be drawn from evidence, case must be submitted to jury, but if evidence is susceptible of only one reasonable inference, question is one of law for court.
5. NEW TRIAL.—In tort action new trial may be granted by trial judge in exercise of just and wise judgment, upon ground that verdict is grossly inadequate.
6. NEW TRIAL.—New trial was discretionary for inadequacy of \$2,000.00 award for death of 39-year-old wife and mother of infant and two married daughters. Code 1952, § 10-1951 *et seq.*

Messrs. Sinkler, Gibbs & Simons, of Charleston, for Appellant, cite: As to evidence failing to prove the slightest bit of negligence or recklessness on part of Defendant, and the verdict is the result of guesswork: 192 S. C. 527, 7 S. E. (2d) 459; 233 S. C. 304, 104 S. E. (2d) 378, 247 N. C. 718, 102 S. E. (2d) 115; Blashfield, Cyclopedia of Automobile Law and Practice, Perm. Ed. Secs. 6042, 6555. As to error on part of trial Judge in setting aside verdict on ground of gross inadequacy: 66 S. C. 302, 44 S. E. 943; 173 S. C. 315, 175 S. E. 532; 132 S. C. 212, 128 S. E. 423; 85 S. C. 470, 67 S. E. 565; 185 S. C. 459, 194 S. E. 446; 40 N. Y. 551; 224 S. C. 244, 78 S. E. (2d) 376; 223 S. C. 477, 76 S. E. (2d) 671; 217 S. C. 203, 60 S. E. (2d) 231; 223 S. C. 421, 76 S. E. (2d) 301; 227 S. C. 298, 87 S. E. (2d) 871; (S. C.) 113 S. E. (2d) 341; 233 S. C. 233, 104 S. E. (2d) 357.

Messrs. William H. Grimball, Jr., and Arthur C. Baker, of Charleston, for Respondent, cite: As to testimony submitted in instant case being sufficient to carry case to the jury: 32 A. L. R. (2d) 988; 10A Blashfield's Cyclopedia of Automobile Law and Practice, Perm. Ed. Sec. 6568; 247 N. C. 718, 102 S. E. (2d) 115; 192 S. C. 527, 7 S. E. (2d) 459; 212 S. C. 449, 48 S. E. (2d) 193; 96 A. L. R. 162. As to trial Judge properly exercising his discretion in granting new trial on ground of inadequacy of verdict: 224 S. C. 244, 78 S. E. (2d) 376; 212 S. C. 26, 46 S. E. (2d) 671; 185 S. C. 459, 194 S. E. 446; 173 S. C. 315, 175 S. E. 532; 66 S. C. 302, 44 S. E. 943.

February 1, 1961.

Moss, Justice.

This is an action to recover damages for the alleged wrongful death of Mildred L. Fuller. Section 10-1951 *et seq.*, 1952 Code of Laws of South Carolina. The respondent asserts that his intestate was riding as a guest passenger in the automobile of the appellant. The right to recover is governed by Section 46-801 of the Code of 1952, which provides:

"No person transported by an owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such motor vehicle or its owner or operator for injury, death or loss in case of an accident unless such accident shall have been intentional on the part of such owner or operator or caused by his heedlessness or his reckless disregard of the rights of others."

The foregoing section, as construed by this Court,

1 restricts liability to a guest to cases where injury or death has resulted from either intentional, heedless or reckless misconduct of the owner or operator of the motor vehicle. *Jackson v. Jackson*, 234 S. C. 291, 108 S. E. (2d) 86.

The complaint alleges that on September 1, 1958, at approximately 9:30 p. m., that Mildred L. Fuller was riding as a passenger in a Ford automobile which was owned and driven by James C. Bailey, the appellant herein. The said Mildred L. Fuller died on said date as a direct and proximate result of injuries received by her due to the operation of said automobile by the appellant at a high, dangerous, reckless and unlawful rate of speed, and in heedless and reckless disregard of the rights of the said Mildred L. Fuller. The appellant, by answer, denied any wrongful conduct on his part that brought about the injury and death of the said Mildred L. Fuller. The cause came on for trial before the Honorable Bruce Littlejohn, and a jury, on November 10, 1959, and resulted in a verdict for the respondent in the amount of \$2,000.00 actual damages. At appropriate stages of the trial, the appellant moved for a nonsuit, directed verdict and judgment *non obstante veredicto*, on the ground that there was no testimony from which it could be inferred that the appellant was driving the automobile at the time of the accident in which the said Mildred L. Fuller lost her life. The other ground was that if it be concluded that the appellant was operating or driving the said automobile, there was no evidence that established that he was guilty of negligence, recklessness, willfullness, wantonness or heed-

lessness, which operated as the proximate cause of the death of respondent's intestate. These motions were denied.

Upon the rendition of the verdict in favor of the respondent for the sum of \$2,000.00 actual damages, he moved for a new trial on the ground that the verdict was grossly inadequate. This motion was sustained and new trial was granted. The case is before this Court upon proper exceptions challenging the foregoing rulings of the Trial Judge. The questions presented are (1) whether the Trial Judge was in error in refusing to grant the motions of the appellant for nonsuit, directed verdict and judgment *non obstante veredicto* on the grounds stated; and (2) did the Trial Judge commit error in granting a new trial on the ground that the verdict was inadequate.

It is a well established rule of law that in passing
2 upon the exceptions of the appellant to the refusal of the Trial Judge to grant his motions for a nonsuit, directed verdict or judgment *non obstante veredicto*, it is incumbent upon this Court to view the evidence and the inferences fairly deducible therefrom in the light most favorable to respondent's case. *Peagler v. Atlantic C. L. Railroad Co. et al.*, 234 S. C. 140, 107 S. E. (2d) 15. *Johnson v. Charleston & W. C. Ry. Co.*, 234 S. C. 448, 108 S. E. (2d) 777.

The evidence shows that Mildred L. Fuller lost her life on September 1, 1958, when the Ford automobile in which she was riding went out of control and left the highway on a curve in Highway No. 642, about five miles east of the Town of Summerville in Dorchester County, South Carolina. The automobile was owned by the appellant, James C. Bailey, and he was in the automobile at the time of the accident, and it appears from the evidence that he sustained severe head injuries and had no recollection of the occurrence. There were no eyewitnesses to the accident.

It is the contention of the appellant that the respondent offered no proof from which it could be reasonably concluded that the appellant was operating the
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automobile at the time of the accident. There is no direct evidence in the record that the appellant was driving the automobile at the time of the accident. However, the circumstantial evidence which tends to prove that the appellant was the driver of the car is that he was the owner thereof; that he kept his automobile in perfect condition, and it was testified by one witness who knew the appellant well that he had never seen anyone else drive the automobile. It was testified that the respondent's intestate did not like to drive an automobile and only drove when it was necessary. There was also testimony that the appellant and Mildred L. Fuller were seen about one-half an hour prior to the accident and that the appellant was then driving the automobile and the deceased was sitting on the opposite side of the driver. On the day in question, the decedent asked the appellant to drive her in an effort to find her husband and daughter. The appellant testified that he drove Mildred L. Fuller to several places in and near Charleston immediately prior to the accident. He further testified that the last time he remembered driving the car was when he came across the new Ashley River Bridge and headed towards the new dual lane highway. The undertaker testified that in preparing the body of Mildred L. Fuller for burial he removed therefrom a knob which had made an imprint on the upper part of her chest. This knob apparently came from the car radio. Since the car radio was to the right of the center of the car, this circumstance would indicate that Mrs. Fuller was seated opposite the car radio to the right of the driver. There was testimony from which it could be inferred that the appellant's head struck the steering wheel, which indicates that he was in the driver's seat when the accident happened. The body of the decedent was found under the right side of the automobile which was turned on its right side. The appellant was thrown clear of the car. The highway patrolman who investigated the wreck testified as follows:

"Q. From the position of the bodies and the position of the car, did that indicate as to the driver? A. Yes, I figured

from him being thrown clear of the car and the door missing thrown clear of the car—the lefthand door was missing from the car—I figured that he must have come out of the lefthand side.”

We think that the physical facts at the scene of the wreck, and the attendant facts and circumstances, which are circumstantial in nature, when considered in the light most favorable to the respondent permit a reasonable inference that the appellant was driving the automobile at the time of the wreck. The case of *Stegall v. Sledge*, 247 N. C. 718, 102 S. E. (2d) 115, 118, involved a factual situation, somewhat similar to the present case, and the Supreme Court of North Carolina held that the evidence was sufficient to take to the jury the issue as to whether the decedent, whose estate was the defendant, was driving at the time of the wreck. We quote therefrom the following:

“Inferences as to who was driving the automobile at the time of the wreck cannot rest on conjecture and surmise. *Parker v. Wilson*, 247 N. C. 47, 100 S. E. (2d) 258; *Sowers v. Marley*, 235 N. C. 607, 70 S. E. (2d) 670. The inferences permitted by the rule are logical inferences reasonably sustained by the evidence, when considered in the light most favorable to the plaintiff. *Whitson v. Frances*, 240 N. C. 733, 83 S. E. (2d) 879. To make out this phase of the case plaintiff must offer evidence sufficient to take the question of whether defendant’s intestate was driving the automobile at the critical moment out of the realm of conjecture and into the field of legitimate inference from established facts. *Parker v. Wilson*, *supra*.

“Plaintiff did not offer any direct evidence showing that defendant’s intestate was driving the automobile at the time of the wreck. She is not required to do so. Circumstantial evidence alone is sufficient to establish this crucial fact. *Bridges v. Graham*, 246 N. C. 371, 98 S. E. (2d) 492, and cases there cited.”

The respondent cites the annotation in 32 A. L. R. (2d) 988, upon the subject of proof, in absence of direct testi-

mony by survivors or eyewitnesses, of who, among occupants of motor vehicle, was driving it at time of accident. In this annotation we find the following statement:

"That one who was shown to be driving an automobile shortly prior to an accident is presumed to have continued as driver was recognized in *Flick v. Shimer* (1941), 340 Pa. 481, 17 A. (2d) 332, and *Morgan v. Peters* (1942), 148 Pa. Super. 88, 24 A. (2d) 644, both set out in para. 2, *supra*, and given effect not only in those cases but in *Clausen v. Johnson's Estate* (1938), 224 Iowa 990, 278 N. W. 297; *Ohio Bell Tel. Co v. Lung* (1935), 129 Ohio St. 505, 196 N. E. 371; *Renner v. Pennsylvania R. Co.*, (1951, App.) 61 Ohio L. Abs. 298, 103 N. E. (2d) 832; and *Huestis v. Lapham's Estate* (1943) 113 Vt. 191, 32 A. (2d) 115."

In the case of *Ohio Bell Tel. Co. v. Lung*, *supra*, where the owner of an automobile and his guest were both killed when the car ran into a telephone pole owned and maintained by the telephone company, the Court said that where, on leaving for the trip the owner was driving, and there were no witnesses as to what happened from that time until the collision, there was a presumption that the situation continued, since there was no evidence to the contrary and no different presumption arose. It was held that the evidence was sufficient to warrant the jury in finding that at the time of the collision the owner was driving his own car and that plaintiff's decedent was riding with him as a guest. In the case of *Nimmer v. Northwestern R. Co.*, 116 S. C. 190, 107 S. E. 479, 480, we find this statement: "The general rule of presumptions is that a given condition, shown to have existed at a certain time, continues until the contrary is shown. * * *"

We think that there was ample circumstantial evidence in this case to require the Trial Judge to submit to the jury the issue of whether the appellant was driving the automobile at the time of the accident.

The next question to be considered is whether the

4 Trial Judge erred in refusing the motions for a nonsuit, directed verdict and judgment *non obstante veredicto* on the ground that there was no evidence of actionable recklessness or wantonness on the part of the appellant. If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. If, however, the evidence is susceptible of only one reasonable inference, the question is no longer one for the jury but one of law for the Court. *Green v. Bolen*, 237 S. C. 1, 115 S. E. (2d) 667. The evidence shows that the curve at which the accident occurred was a long one and there was a traffic control warning sign just before the curve was reached and which, of necessity, the automobile here had to pass. It was testified to by the highway patrolman, who investigated the accident, that the car started leaving the road at the beginning of the curve and it traveled 240 feet on the shoulder of the road, still on its wheels before it started turning. Then it traveled another 250 feet, leaving the road and knocking the top out of a pine tree 9 feet and 3 inches from the ground. After striking the tree, the car continued for 47 feet and 6 inches before coming to rest. This witness further testified that from the looks of the car and the imprints on the ground that it had turned over quite a few times. This witness, and others, testified that the automobile was totally destroyed and was smashed up on every side, even the bottom and top thereof. Considering the evidence in the light most favorable to the respondent, as must be done in passing on these motions, we think that the jury could reasonably infer that the appellant, if he were driving the car, was reckless in failing to have his car under proper control so as to be able to avoid leaving the road and overturning, and in driving at an excessive rate of speed; in failing to drive at an appropriately reduced speed when approaching and going around a curve, when warned thereof by adequate and proper signs; and further, such recklessness was the proximate cause of the injury and death of re-

spondent's intestate. The violation of at least four statutory provisions of the Code were indicated by the evidence. Sections 46-361, 46-362, 46-363, and Section 46-342 of the 1952 Code of Laws of South Carolina.

In the case of *Leek v. New South Express Lines*, 192 S. C. 527, 7 S. E. (2d) 459, 462, this Court said:

"The rule of criminal law that where circumstantial evidence is relied upon, the facts proved must be such as to preclude every other hypothesis but the guilt of the accused, does not apply in civil cases. In civil actions every other reasonable conclusion need not be excluded; proof of circumstances warranting a given inference is sufficient in such cases. Annotation, 97 Am. St. Rep., 802.

"The right to recover on circumstantial evidence for death resulting from another's negligence depends upon the reasonable and logical connection such proof establishes between the death and the negligent act alleged to have caused it. It is incumbent upon the plaintiff, in the absence of direct evidence, to show the existence of such circumstances as would justify the inference that the injury which caused the death was due to the wrongful act of the defendant, and not leave the question to mere speculation or conjecture. The facts and circumstances shown should be reckoned with in the light of ordinary experience and such conclusions deduced therefrom as common sense dictates. 16 Am. Jur. Sec. 328, Page 222. *Settle v. St. Louis & San Francisco R. Co.*, 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; *Anderson v. Asphalt Distributing Co.*, Mo. Sup., 55 S. W. (2d) 688, 86 A. L. R. 1033; *Paine v. Gamble Stores*, 202 Minn. 462, 279 N. W. 257, 116 A. L. R. 407; *Louisville Trust Co. v. Morgan*, 180 Ky. 609, 203 S. W. 555, 7 A. L. R. 396; *Leon v. Kitchen Bros. Hotel Co.*, 134 Neb. 137, 277 N. W. 823, 115 A. L. R. 1078; 20 Amer. Jur., Section 272, Page 259; 20 Amer. Jur., Section 1189, Page 1041."

The evidence for the respondent has been stated sufficiently to show that it was ample for submission to the jury upon

the issue of heedlessness and recklessness with respect to the operation of the motor vehicle. There was no error on the part of the Trial Judge in submitting the factual issues in this case to the jury.

The final question for determination is whether the Trial Judge committed error and abused his discretion in setting aside the verdict of \$2,000.00 in favor of the respondent on the ground that the same was grossly inadequate.

It is now well settled that in actions for torts, a new
5 trial may be granted by the Trial Judge in the exercise of a just and wise judgment, upon the ground that the verdict is grossly inadequate. *DePass v. Broad River Power Company et al.*, 173 S. C. 387, 176 S. E. 325, 95 A. L. R. 545.

In the case of *McKibben v. Anthony et al.*, 185 S. C. 459, 194 S. E. 446, 447, a verdict was returned for the plaintiffs in the sum of \$1.00 actual and punitive damages. The plaintiffs moved for a new trial on the ground of inadequacy of damages and the motion was granted. The sole question upon appeal was whether there was error in so doing. In affirming the lower Court, it was held that the Trial Judge had the power and that it was in his discretion to grant a new trial for inadequacy of damages. This Court, in its Opinion, quoted with approval from *McDonald v. Walter*, 40 N. Y. 551, the following:

“* * * A verdict for grossly inadequate amount stands upon no higher ground in legal principle, nor in the rules of law or justice, than a verdict for excessive or extravagant amount. It is doubtless true that instances of the former occur less frequently, because it is less frequently possible to make it clearly appear that the jury have grossly erred. But when the case does plainly show such a result, justice as plainly forbids that the plaintiff should be denied what is his due, as that the defendant should pay what he ought not to be charged. * * *”

In the case of *Fuller v. Keller*, 173 S. C. 315, 175 S. E. 532, 533, we said:

"The motion for a new trial was made on the sole ground that the verdict was too small in amount to compensate the plaintiff for his personal injuries together with his pain and suffering. There was no ground urged as to prejudice, caprice, passion, or any similar reason for the finding of the verdict. The disposition of the motion for a new trial as based solely on the one ground, which is a question of fact, was wholly in the discretion of the circuit judge (*Bodie v. [Charleston & W. C.] R. Co.*, 66 S. C. 302, 44 S. E. 943), and we cannot say that his ruling constituted error of law."

The case of *Nichols v. Craven*, 224 S. C. 244, 78 S. E. (2d) 376, was an action by a motorist for personal injuries and property damages sustained in an automobile collision. A verdict of \$2,500.00 was returned for the plaintiff, and upon his motion a new trial was granted on the ground of the inadequacy of the verdict. The defendant being able and willing to pay the verdict, resisted the motion and appealed to this Court from the granting thereof. It was held that the order granting the new trial was based upon facts of the case, and there being sufficient facts upon which to base such order, there was no abuse of discretion or error of law. It was also held that an order granting or refusing a new trial, based solely on an error of law, is subject to review by the Supreme Court, but when the order is based upon questions of fact, or upon both questions of law and fact, it is not appealable. This last statement is supported by the decisions in *Bowman v. Harby*, 109 S. C. 396, 96 S. E. 144, and *Sellars v. Collins et al.*, 212 S. C. 26, 46 S. E. (2d) 176.

It appears from the record that Mildred L. Fuller, the respondent's intestate, was thirty-nine years of age, with a life expectancy of 30.8 years. She left as her beneficiaries her husband and one infant daughter, nineteen months of age at the time of the collision, and in addition, two married daughters by a former marriage. It was testified that the

deceased was a good wife, a good housekeeper and a perfect mother. The husband testified that as a result of her death, that he and the baby had suffered a great loss. Based upon the foregoing testimony, the Trial Judge said: "I conclude that the verdict of the jury was grossly inadequate such as to justify and require a new trial, and a new trial is hereby granted on this one ground only."

Since the Trial Judge felt that the amount of the
6 verdict was inadequate, he was empowered to set it aside and grant a new trial. This was a matter that was addressed to his sound discretion, and having found as a fact that the verdict was grossly inadequate, and there being sufficient facts upon which to base such order, there was no abuse of discretion nor error of law committed.

The judgment of the lower Court is affirmed.

STUKES, C. J., and TAYLOR, OXNER and LEGGE, JJ.,
concur.

17743

Fred A. KRELL, Appellant, v. SOUTH CAROLINA STATE
HIGHWAY DEPARTMENT, Respondent
(118 S. E. (2d) 322)

Proceeding on application by successful claimant for workmen's compensation for review of award on basis of change of condition. The Industrial Commissioner denied further benefits and Industrial Commission affirmed and claimant appealed. The Court of Common Pleas, Richland County, George T. Gregory, Jr., J., affirmed award of commission and claimant appealed. The Supreme Court, Taylor, J., held that evidence sustained finding of Industrial Commission that claimant did not sustain any hernia condition as result of his prior injury by accident.

Affirmed.

1. WORKMEN'S COMPENSATION.—If a review of a compensation agreement or settlement is sought on change in condition of employee,

change in condition must be shown, and it must be causally connected with original compensable accident.

2. **WORKMEN'S COMPENSATION.**—In a reopening proceeding, issue before Commission in sharply restricted to question of extent of improvement or worsening of injury on which original award was based.
3. **WORKMEN'S COMPENSATION.**—If claimant sustained injuries at time of original action and he knew about them at time of his claim, but for some reason failed to include them in the claim, he could not for first time assert disability resulting from those injuries in petition based on change of condition.
4. **WORKMEN'S COMPENSATION.**—Evidence sustained finding of Industrial Commission that claimant, who sought review of prior award in his favor on basis of change in condition, did not sustain any hernia condition as result of his prior injury by accident. Code 1952, §§ 72-154(1-5), 72-354.
5. **WORKMEN'S COMPENSATION.**—Court was bound by findings of Industrial Commission supported by ample evidence. Code 1952, § 72-354.

Thomas Kemmerlin, Jr., Esq., of Columbia, for Appellant, cites: As to difference between inguinal hernia and incisional hernia: 72 A. L. R. (2d) 554; 189 S. C. 188, 200 S. E. 727; Larson, Workmen's Compensation Law, Sec. 39.70. As to an incisional hernia, being defined as one occurring from an operative or accidental incision, is not a hernia in the sense in which the legislature used the word in the Workmen's Compensation Act: 201 S. W. (2d) 129; 20A, Words and Phrases, Incisional hernia 133; 55 Idaho 609, 45 P. (2d) 597; 204 Okl. 117, 227 P. (2d) 647; 56 Idaho 206, 52 P. (2d) 237; 119 Pa. S. 455, 179 A. 919; 19 Words and Phrases, 40; 55 A. L. R. (2d) 1020. As to the Industrial Commission failing to make an award, findings of fact, and conclusions of law as required by Section 72-354, Code of Laws of South Carolina, 1952: 198 F. (2d) 142.

Messrs. Daniel R. McLeod, Attorney General, and David Aiken, Assistant Attorney General, of Columbia, for Respondent, cite: As to Supreme Court being bound by findings of fact-finding body: 201 S. C. 349, 23 S. E. (2d) 19. As to Appellant failing to meet the requirements of the "Hernia Statute": 189 S. C. 188, 200 S. E. 727.

February 3, 1961.

TAYLOR, Justice.

This is a workmen's compensation case.

Claimant, while working for the South Carolina State Highway Department, developed kidney trouble unconnected in any way with his employment, and on March 13, 1942, had his left kidney removed. On October 18, 1942, claimant consulted his physician and was informed that the kidney incision was healed and was dismissed from further treatment. Claimant returned to work and on November 20, 1942, fell from a stool while reaching for some papers while on his job with the respondent. As a result of this fall claimant received a back injury and an operation on his back made necessary by this injury was performed in December of 1944.

Claim was filed with the South Carolina Industrial Commission and on August 30, 1945, October 26, 1945, and December 19, 1945, hearings were held before Commissioner W. Raymond Johnson. On April 24, 1946, the Commissioner filed an opinion and award in favor of the claimant. No appeal was taken from this opinion and award. Within the time allowed by statute, claimant applied for a review of award on change of condition. On January 26, 1955, and December 13, 1955, hearings were held before Commissioner John W. Duncan, who, on November 26, 1957, filed an opinion and award denying claimant any further benefits under the Workmen's Compensation Law. Application was duly made to the Industrial Commission for a review thereof; and on June 25, 1958, the Industrial Commission affirmed the single Commissioner. Claimant then appealed to the Court of Common Pleas for Richland County. After hearing, the Honorable George T. Gregory, Jr., on March 14, 1960, filed an order overruling all exceptions and affirming the award of the Industrial Commission; and it is from this order that claimant now appeals to this Court contending that the uncontradicted evidence shows

that the claimant sustained a compensable injury and, further, that the Industrial Commission failed to make an award, findings of fact and conclusions of law as required by Section 72-354, Code of Laws of South Carolina, 1952.

In passing upon the question of compensable injury, the Commission found as a fact that claimant did not sustain "any hernia condition as a result of his aforesaid injury by accident of November 20, 1942" and cites Sec. 72-154, Code of Laws of South Carolina, 1952, which provides:

"In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Commission:

"(1) That there was an injury resulting in hernia or rupture;

"(2) That the hernia or rupture appeared suddenly;

"(3) That it was accompanied by pain;

"(4) That the hernia or rupture immediately followed an accident; and

"(5) That the hernia or rupture did not exist prior to the accident for which compensation is claimed."

Claimant contends that he was suffering from an incisional hernia and, therefore, the rule heretofore referred to does not apply. The Circuit Court ruled against this contention and affirmed the findings of fact as determined by the Commission. Nowhere in the original hearing was any reference made to an "incisional hernia" or "break in the left side wall" as a result of the accident of November 20, 1942. The award was made and compensation paid claimant for "injury to his back * * * resulting in the necessity of an operation"; and there was no appeal from this award and the file closed.

On April 23, 1947, three days before the ending of the statute of limitations period, claimant filed claim and request for hearing thereon. In claimant's application for re-

view on change of condition, he gave his reason as being "that the break in his left side wall again began giving him trouble." However, at the latter hearing, he took the position that he had a hernia as a result of his accident of November 20, 1942, and that the hernia was not considered in the original award.

If a review of a compensation agreement or settlement is sought on the change in the condition of the employee, a change in condition must be shown, and it must be causally connected with the original compensable accident. *Weymer v. Industrial Commission*, 404 Ill. 271, 88 N. E. (2d) 841; *Wallace v. Leitzen*, 243 Minn. 481, 68 N. W. (2d) 372; *Sharfaransky v. Comos Footwear Corp.*, 277 App. Div. 803, 96 N. Y. S. (2d) 706; *Macedo v. Atlantic Rayon Corp.*, 81 R. I. 339, 103 A. (2d) 64; and *Cromer v. Newberry Cotton Mills et al.*, 201 S. C. 349, 23 S. E. (2d) 19, 28, in which this Court stated:

"It is not the province of this Court to determine whether the greater weight of the evidence supported the finding that a change had taken place in the condition of the claimant such as would warrant an extension or enlargement of the award, or whether the greater weight of the evidence supported the finding that such change resulted from the injury of September 10, 1940. Such facts must be determined by those whose duty it is to find the facts. The duty of this Court is to determine whether there was any competent evidence in support of the findings of the fact-finding tribunal. The transcript of record contains the testimony of those who were in intimate association with the claimant, and it contains also the expert testimony of several physicians, and other evidence, upon which the findings of fact in the case could be, and were, made by the fact-finding tribunal, and this Court is bound thereby."

In a reopening proceeding, the issue before the Commission is sharply restricted to the question of extent of improvement or worsening of the injury on

which the original award was based. If claimant sustained injuries at the time of the original action which he knew about at the time of his claim but for some reason failed to include in the claim, he cannot for the first time assert disability from these injuries in a petition based on "Change of condition." *Comer v. Standard Oil Co.*, 131 Me. 386, 163 A. 269; *MacKinnons Case*, 286 Mass. 37, 190 N. E. 117; *Spence v. State Comp. Comm.*, 110 W. Va. 162, 157 S. E. 164; *Larson's Workmen's Compensation Law*, Vol. 2, page 333; *Cromer v. Newberry Cotton Mills et al.*, *supra*.

There is no contention of any accident other than 4, 5 that of November 20, 1942. No claim was filed for a hernia, and there is nothing in the record to show that such existed at the time of the award. The Commission found as a fact that claimant did not sustain "any hernia condition as a result of his aforesaid injury by accident of November 20, 1942," and there is ample evidence to support these findings. We are, therefore, bound thereby.

In the conclusions of law the Commission set forth Sec. 72-154, Code of Laws of South Carolina, 1952 (known as the hernia section) as being applicable and claimant contends that an "incisional hernia" is not a "hernia" within the meaning of the act.

The hearing Commissioner having determined that claimant received no such injury on November 20, 1942, and there being evidence to sustain such finding, it is unnecessary to determine here whether such injury is controlled by Sec. 72-154, Code of Laws of South Carolina, 1952.

For the foregoing reasons, we are of opinion that the order appealed from should be affirmed and it is so ordered. Affirmed.

STUKES, C. J., and OXNER, LEGGE and MOSS, JJ., concur.

17744

Henry L. ROSCOE, as Administrator of the Estate of James B. Huntley, Respondent, v. H. M. GRUBB and Harold Lee Grubb,
Appellants

(118 S. E. (2d) 337)

Wrongful death action. The Common Pleas Court, Chesterfield County, J. B. Ness, J., rendered judgment for plaintiff, and defendants appealed. The Supreme Court, Legge, J., held that evidence was insufficient to warrant inference that death of plaintiff's intestate, on August 3, 1957, had been proximately caused by injury received in automobile collision on August 9, 1956.

Reversed and remanded for entry of judgment in favor of appellants.

1. DAMAGES.—Where physical injury is coincident with, or immediately follows, accident and is naturally and directly connected with it, lay testimony may be sufficient to carry to trier of facts issue of whether accident proximately caused it, despite expert medical testimony that it did not; and in such cases, consideration is to be given to fact that physical injury immediately, or promptly, followed accident, but that is not to say that finding of causation may rest solely upon illogic of *post hoc, ergo propter hoc*.
2. DEATH.—Evidence, in wrongful death action, was insufficient to warrant inference that death of plaintiffs intestate, on August 3, 1957, had been proximately caused by injury received in automobile collision on August 9, 1956, or to take case against defendants to jury. Supreme Court Rules, rule 27.

Messrs. Paul M. Arant, of Pageland, and Nelson, Mullins & Grier, of Columbia, for Appellants, cite: As to the only reasonable inference from the testimony being that plaintiff had failed to prove that the death of his intestate resulted substantially and proximately from any actionable negligence on the part of the defendant: 212 S. C. 485, 48 S. E. (2d) 324; 100 C. J. S. 611, par. 547 (10); 201 S. C. 146, 21 S. E. (2d) 561; 79 A. L. R. 351; 86 A. L. R. 957; 105 U. S. 249, 26 L. Ed. 1070. As to testimony of plaintiff's lay witness not being sufficient to establish liability of defendant: 231 S. C. 111, 97 S. E. (2d) 392; 209 S. C. 463,

40 S. E. (2d) 681; 213 S. C. 355, 49 S. E. (2d) 505; 324 Mass. 415, 86 N. E. (2d) 641; 78 So. (2d) 159; 161 Penn. Super. 601, 56 A (2) 111.

Messrs. F. Turner Clayton and Charles O. Nock, of Cheraw, for Respondent, cite: As to trial Judge properly refusing the defendants' motion for judgment notwithstanding the verdict: 208 S. C. 507, 38 S. E. (2d) 710; 231 S. C. 75, 97 S. E. (2d) 205; 223 S. C. 204, 74 S. E. (2d) 914; 211 S. C. 378, 45 S. E. (2d) 595. As to testimony being sufficient to establish causal relationship between accident and death of plaintiff's intestate: 28 S. C. 465, 63 S. E. (2d) 314; 232 S. C. 593, 103 S. E. (2d) 265; 52 S. C. 323; 231 S. C. 111, 97 S. E. (2d) 392.

February 8, 1961.

LEGGE, Justice.

In this action for wrongful death the defendants' motions for nonsuit and direction of verdict were refused, and the jury found for the plaintiff \$17,500.00 actual damages. Thereafter, the trial Judge refused defendants' motion for judgment *n. o. v.*, but ordered a new trial because of excessiveness of the verdict unless the plaintiff should remit \$3,500.00 of it, which was done. From the judgment accordingly entered in the amount of \$14,000.00 the defendants appeal; and the single issue before us is whether there was any evidence reasonably warranting the inference that the death of plaintiff's intestate on August 3, 1957, was proximately caused by injury received in an automobile collision on August 9, 1956.

The collision was between an automobile of the decedent, Mr. Huntley, which he was driving, and an automobile registered in the name of the defendant H. M. Grubb and driven by his minor son and codefendant Harold Lee Grubb. Mrs. Huntley was in the car with her husband; and immediately after the accident they went to the office, or clinic, of Dr. Jerry Perry, who for some years had been

their family physician. As a witness for the plaintiff, Dr. Perry testified, in substance, as follows:

Mr. Huntley, who was sixty-three years of age at the time of the accident, was first treated by Dr. Perry in August, 1953, and thereafter several times during September, and in November, of that year. When he first came to Dr. Perry's office, on August 18, 1953, he was suffering from bronchitis, but also gave a history of having diabetes. On that occasion his blood pressure was a little high, and there was some albumen, but no sugar, in his urine. Dr. Perry treated him for bronchitis, and last saw him that year on November 7. In 1954 he was seen by Dr. Perry only twice; in 1955 at least twenty times, primarily in relation to his diabetes. In March, 1956, Dr. Perry saw him twice, and, suspecting a mild congestive heart failure, prescribed digitalis; arteriosclerosis and diabetes were also evident.

Thereafter Dr. Perry did not see Mr. Huntley until August 9, 1956, shortly after the accident. His only complaint was that he had a bruise of his chest and of his left knee; and he appeared concerned about the condition of his wife. (We infer that she had sustained some injuries, but their extent is not mentioned in the record here.) Dr. Perry testified that his examination of Mr. Huntley revealed that his bruises were trivial, requiring no medication; and that after examining Mrs. Huntley also he reassured them and told them to go home.

Mr. Huntley came to Dr. Perry's office on the following day, August 10, for a general examination; and since he still complained of pain in his chest Dr. Perry took an x-ray, which revealed nothing abnormal. On August 13, when Dr. Perry next saw him, he manifested symptoms of congestive heart failure, for which Dr. Perry prescribed digitalis and Diamox, the latter a diuretic. Dr. Perry again saw him on August 15, 16, 23 and 27, September 3 and 29, and October 1. There is no suggestion that treatment during this period was for any physical injury sustained in the accident. Ac-

cording to Dr. Perry, Mr. Huntley's symptoms, other than those of general deterioration as the result of diabetes and arteriosclerosis, were primarily those of emotional instability and worry.

On October 1 he was free of unfavorable physical symptoms and, in Dr. Perry's opinion, was in reasonably good physical condition for a man of his age. On November 2, 1956, he was brought to Dr. Perry's office showing symptoms of a coronary heart attack; and after treating him there and later visiting him several times at his home, Dr. Perry had him hospitalized on November 12. At that time he was feverish, somewhat dehydrated, and mentally confused. On November 23, Mr. Huntley having returned from the hospital, Dr. Perry visited him at his home and thereafter continued to see and treat him until his death, which occurred on or about August 3, 1957. During this period Mr. Huntley's deterioration, mental and physical, was rapid; he made groundless accusations against his wife; he would get lost in his own home; he would at times wander into the highway; he had to be constantly attended.

In our opinion Dr. Perry's testimony furnishes no reasonable basis for inference that Mr. Huntley's death was proximately caused or hastened by the trivial physical injury that he had sustained in the automobile accident a year before. And this conclusion on our part is not shaken by the following, which we quote from the concluding portion of his examination in chief:

"Q. All right, now Doctor, this collision that he was involved in, did he ever recite to you what occurred at that time? Did this worry him or bother him in any way that you saw? A. He was quite concerned about his wife and then later on after he saw that she was going to be all right he was quite concerned because—he expressed to me the fact he was quite concerned because he couldn't get anything settled about it. In other words, it was in a state of instability at that time.

"Q. Doctor, in your opinion did this collision have any effect on the speed of this arteriosclerosis condition that you described that Mr. Huntley had? A. Judging from the fact that I had treated him prior and the fact that he was doing reasonably well and then he had his accident in August and the beginning of his deterioration rather markedly in November of the same year, it would be my opinion that it accelerated the process.

"Q. As a result did it accelerate the time of his death? A. Yes, sir."

It is significant that in his testimony just quoted Dr. Perry refers not to Mr. Huntley's injuries, but to "his accident", as accelerating the process of arteriosclerosis and consequent deterioration and ultimate death. In context with the rest of his testimony, it can mean only that in the opinion of the witness Mr. Huntley's arteriosclerosis was accelerated as the result of his concern over his wife's condition and worry over his own inability to obtain prompt settlement of his claims arising out of the accident.

Respondent relies upon *Padgett v. Colonial Wholesale Distributing Co.*, 232 S. C. 593, 103 S. E. (2d) 265, for support of his contention that under this testimony it was for the jury to say whether or not Mr. Huntley's death was proximately caused by the defendants' negligent act. But that case does not support such contention. There, recognizing the rule in *Mack v. South Bound R. Co.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913, we upheld recovery for physical injury sustained as a consequence of shock, fright, and emotional upset directly caused by the defendant's negligent act, though there was no physical impact. Here, the claimed emotional upset and consequent acceleration of physical deterioration resulted not from the defendants' negligent act, but from Mr. Huntley's concern, at first, over his wife's condition, and from his fretting over the delay in settlement of his claims. Distinction between the *Padgett case* and the one at bar is obvious. In the former, the plaintiff's fright was a natural, immediate, and fore-

seeable result of the negligent operation of the defendant's truck whereby it crashed into the plaintiff's home; the ensuing physical consequences were no less the direct result of the negligent act than were the shock and fright that attended it. In the instant case Mr. Huntley's injury was nothing more than a trivial bruise; of itself it entailed, so far as the record indicates, no shock, fright or emotional upset. His concern over his wife's possible injuries was apparently short-lived, and according to Dr. Perry it ended when "he saw that she was going to be all right." The worry that respondent would couple to appellants' negligent act so as to make that act the proximate cause of the death of his intestate concerned not the negligent act itself but the decedent's impatience or dissatisfaction with the progress of negotiations or litigation looking to settlement of his claims, which included a claim for damage to his automobile. To uphold his contention would be to extend the concept of proximate cause far beyond the scope contemplated in the *Padgett* case or any other precedent in this jurisdiction, and, we think, beyond reason.

Respondent's case is not aided by the testimony of his lay witnesses. Those who actually testified were Mr. Huntley's widow, his pastor, and a married daughter who lived nearby; in addition, there were three members of the decedent's family, and two neighbors, who did not testify in person, but as to whom it was stipulated that they were available as witnesses for the plaintiff and that if they were to take the stand their testimony would be substantially the same as the three lay witnesses who had testified. Mrs. Huntley's testimony was to the effect that although her husband was a diabetic he was healthy and robust prior to the accident; that after the accident he did no more work around his farm; that before he went to the hospital in November, 1956, he was nervous, lost appetite and weight, and talked "a good bit", "mostly about the wreck"; that he just "kept going down and down until he just become skin and bones"; and that for some time before his death he "completely lost his mind" and "had to be cared for just like a baby."

The Reverend Mr. Oldham testified that after the accident Mr. Huntley, who before had attended church about once every two weeks, came to church only once; that when the witness and Mrs. Oldham called upon Mr. and Mrs. Huntley a day or so after the accident Mr. Huntley seemed to be "sore and suffering some from the wreck" and both he and Mrs. Huntley appeared "highly emotional and disturbed about it"; that thereafter the witness called upon Mr. Huntley about once a week "and then he began to grow worse," lost weight, and seemed "just wearing away."

Mr. Huntley's married daughter, Mrs. Chapman, testified that before the accident her father was in sound health and had had no serious illness. And: "after the collision Dad became very nervous and when we would talk to him, get in conversation, he would immediately wander off into about the wreck. That was the main thing that seemed to be on his mind was about the wreck * * *. He finally, I would say after November, he lost his mind completely to the point where we could not leave him alone at all."

We have held that where physical injury is coincident 1, 2 with or immediately follows an accident and is naturally and directly connected with it lay testimony may be sufficient to carry to the triers of the facts the issue of whether or not the accident proximately caused it, despite expert medical testimony that it did not. *Poston v. Southeastern Construction Co.*, 208 S. C. 35, 36 S. E. (2d) 858; *Ballenger v. Southern Worsted Corp.*, 209 S. C. 463, 40 S. E. (2d) 681. In such cases consideration is to be given to the fact that the physical injury immediately, or promptly, followed the accident; but that is not to say that a finding of causation *may* rest solely upon the illogic of *post hoc, ergo propter hoc*. There must, in addition, be such natural and obvious relationship between the facts of the accident and the subsequent injury as to render consonant to common sense and reason the inference that the injury not only followed the accident but also resulted from it. The testimony of the lay witnesses here fails to meet that test. In our opin-

ion it affords no reasonable basis for inference that the facts of the accident, including the trivial physical injury resulting, caused Mr. Huntley's worry, aggravated his diabetic or arteriosclerotic condition, or otherwise proximately caused or hastened his death.

Reversed and remanded for entry of judgment in favor of appellants under Rule 27.

STUKES, C. J., and TAYLOR, OXNER and MOSS, JJ., concur.

17745

Watt E. SMITH and Talley E. Smith, Respondents, v. SOUTHERN RAILWAY—CAROLINA DIVISION, Appellant
(118 S. E. (2d) 440)

Farmer's action against the railroad for damages to his crops growing along railroad's tracks. The Common Pleas Court of Orangeburg County, J. Woodrow Lewis, J., entered judgment for the farmer and the railroad appealed. The Supreme Court, Oxner, J., held that the evidence sustained the jury's finding that the farmer had acquired title by adverse possession to 65 feet of the 100-foot right of way owned by the railroad in fee simple, by fencing and cultivating same after refusing to remove fence on the railroad's demand, even though fence was removed each spring and replaced each fall after cultivation of crops.

Affirmed.

1. ADVERSE POSSESSION.—Use of a portion of railroad's right of way in a way which does not interfere with railroad purposes is presumptively permissive, and merely enclosing a part of right of way by fence is not sufficient to put railroad on notice of a claim of adverse possession.
2. ADVERSE POSSESSION.—If adjacent landowner, under claim of ownership, encloses a portion of railroad's right of way by a substantial fence and refuses upon railroad's demand to remove it, railroad has notice of an assertion of hostile possession, and such assertion may form basis of claim of adverse possession.

3. ADVERSE POSSESSION.—To acquire title by adverse possession claimant must be in continuous and uninterrupted possession for full statutory period.
4. ADVERSE POSSESSION.—The possession necessary to acquire title by adverse possession does not require that person in possession, his tenant or agent must be actually on land during whole statutory period, and actual possession once taken will continue until party taking possession be disseised or does some act which amounts to a voluntary abandonment of possession.
5. ADVERSE POSSESSION.—Evidence sustained jury finding that farmer had acquired title by adverse possession to 65 feet of 100-foot railroad right of way owned by railroad in fee simple, by fencing and cultivating same after refusing to remove fence upon railroad's demand, even though fence was removed each spring and replaced each fall after cultivation of crops.

Messrs. Moss & Moss, of Orangeburg, and Frank G. Tompkins, Jr., of Columbia, for Appellant, cite: As to Respondents not proving necessary elements required to acquire title, by adverse possession, to a portion of Appellant's right-of-way: 195 S. C. 455, 12 S. E. (2d) 7; 85 S. C. 440, 67 S. E. 546; 137 S. C. 468, 135 S. E. 567; 2 C. J. S. 541, Sec. 26 b (2), (3); 1 R. C. L. 716, 717, Sec. 30; 143 S. C. 487, 141 S. E. 688; Jones on Easements; 105 S. C. 319, 89 S. E. 1018; 85 S. C. 440, 67 S. E. 546; 109 S. C. 444, 96 S. E. 188; 63 S. C. 266, 41 S. E. 299; 85 S. C. 134, 67 S. E. 235.

Messrs. T. B. Bryant, Jr., and Fred R. Fanning, Jr., of Orangeburg, for Respondents, cite: As to there being sufficient proof of adverse possession to sustain Respondent's title to land in question: 65 S. E. 524; 44 S. E. 86; 66 S. C. 266, 41 S. E. 299. As to question of abandonment or non-abandonment being properly submitted to the jury: 105 S. C. 329, 89 S. E. 1021; 138 S. C. 31, 136 S. E. 13.

February 9, 1961.

OXNER, Justice.

The question for determination on this appeal is whether the evidence is sufficient to sustain a finding by the jury that respondents acquired title by adverse possession to a portion

of appellant's right of way. The Southern Railway passes through a farm in Orangeburg County owned by respondents, father and son. In this area it is straight and runs north and south. It is conceded for the purpose of this case that appellant originally had fee simple title to a right of way through respondents' farm extending 100 feet from the center of the track on each side. Respondents say that the western side now extends only 35 feet from the center of the track and that they have been in exclusive possession under a claim of ownership of the remaining 65 feet for a period of more than 40 years, with full knowledge on the part of appellant of the adverse character of their claim.

The present controversy as to the title to the 65 foot strip above mentioned arose shortly after one of appellant's freight trains was derailed on August 28, 1955, at which time 33 boxcars turned over. Respondents were then cultivating the lands on both sides of the railroad to within 35 feet of the center of the track. In clearing the wreck, appellant damaged the crops and lands on the western side of the track both within and beyond the 65 foot strip. Appellant admitted its liability for any damage sustained on the land lying more than 100 feet from the track, but denied liability for any damage within the 65 foot strip. Thereafter this action was brought for the recovery of all damages sustained. The case was submitted to the jury on special issues. They found (1) that respondents had acquired title to the 65 foot strip by adverse possession; (2) that the damage within the 65 foot strip amounted to \$358.80; and (3) that the damage beyond the 65 foot strip amounted to \$100.00. No question is raised on this appeal as to the extent of the damages found by the jury. Appellant further admits its liability for the sum of \$100.00, damage occurring on land admittedly owned by respondents. Its sole contention on this appeal is that there is no evidence sustaining the finding of adverse possession as to the 65 foot strip and, therefore, the Court erred in submitting to the jury the question of any damages sustained within this area.

The facts relating to the claim of adverse possession are undisputed. Respondents acquired this farm in 1917. There was then on it a three-strand barbed wire fence, about a third of a mile in length, which ran parallel to the railroad, about 35 feet west of the center of the track. The record does not disclose when or under what circumstances this fence was built. After buying this farm, respondents extended the fence for a distance of approximately a half-mile to another fence. The new fence was also located on a line 35 feet from the center of the track. In erecting it, cypress posts were first used but later the barbed wire was attached to creosoted posts. In the summer the land within the fence was cultivated and in the winter used to graze cattle. Each spring the new fence was removed so as to permit the use of tractors in cultivating. When the crops were harvested in the fall, the fence was replaced to confine the cattle. This practice of removing the fence in the spring and replacing it in the fall continued each year without objection from appellant until about the year 1931 or 1932, when appellant's section master sought to stop respondents from replacing the fence, contending that it was on the railroad property. This employee was thereupon told by respondent Watt E. Smith that it was his property and that the "safest place" for him (the section master) "would be on the railroad." The section master then got off the property and the fence was replaced. The fencing practice above outlined was thereafter continued without any further objection from the railroad until this action was commenced in 1957.

While there is a diversity of opinion in other jurisdictions,^{1, 2} it has been consistently held in this State, in line with the great weight of authority elsewhere, that land embraced within a railroad right of way may under certain circumstances be acquired by adverse possession. This doctrine was recognized in the recent case of *Southern Railway—Carolina Division v. Horne Investment Co.*, 233 S. C. 440, 105 S. E. (2d) 527. However, in view of the use made of a railroad right of way, acts ordinarily deemed hos-

tile in other cases may not bear that character where adverse title is claimed against a railroad company. Since frequently such a company has no immediate need for all of its easement, the use of a portion of a right of way by an individual which does not interfere with the use of the way for railroad purposes is presumptively permissive. Accordingly, we have held that the use of such property by an adjacent landowner for agricultural purposes, such as grazing and cultivation, is ordinarily not inconsistent with the enjoyment of the easement and forms no basis for a claim of hostile possession. *Atlantic Coast Line Railroad Company v. Little*, 195 S. C. 455, 12 S. E. (2d) 7. We have further held that merely enclosing a part of a right of way by a fence is not sufficient to put the company on notice of a claim of adverse possession. *Atlantic Coast Line Railroad Co. v. Epperson*, 85 S. C. 134, 67 S. E. 235. But if an adjacent landowner under a claim of ownership encloses a portion of a right of way by a substantial fence and refuses upon demand to remove it, the railroad company is then put on notice of an assertion of hostile possession. Such an assertion of right to exclusive occupancy of the land is not compatible with the right of easement belonging to the railroad company and may form the basis of a claim of adverse possession. The leading case on this question is *Southern Railway Co. v. Beaudrot*, 63 S. C. 266, 41 S. E. 299, 300. It was there stated: "We do not say that the mere use or cultivation of land within the right of way acquired by a railroad company is such adverse use as would give currency to the statute of limitations, unless the use is inconsistent with the easement; but we do say that the enclosing of land within the right of way, under a claim of exclusive right to use and occupation, and a refusal to remove the enclosure after demand therefor, is some evidence of the assertion of a claim incompatible with plaintiff's alleged easement, which, under the issues raised, ought to have been submitted to the jury." To the same effect, see *Hill v. Southern Railroad*, 67 S. C. 548, 46 S. E. 486.

In *Atlantic Coast Line Railroad Company v. Epperson*, *supra*, the Court was asked by the Railroad Company to reconsider the rule laid down in the *Beaudrot case* but the Court refused to disturb it. This rule has been consistently followed and has never been regarded as inconsistent with the rule laid down in *Atlanta & Charlotte Air Line Railroad Co. v. Limestone Globe Land Co.*, 109 S. C. 444, 96 S. E. 188, 190 and repeated in several later cases, that a right of way of a railroad "cannot be lost by prescriptive use or adverse possession unless by the erection of a permanent structure, accompanied by notice to the railroad company of an intention to claim adversely to its right."

In most, if not all, of the foregoing cases the railroad company had a mere easement. Here the claim of adverse possession is strengthened by the fact that appellant had fee simple title to its right of way. We think the evidence fully warrants an inference that the period of adverse possession commenced running when respondents told the section master that they owned the property and replaced the fence over his protest.

But appellant says that even if the statute commenced
3 to run in 1931 or 1932, the continuity of the possession was interrupted each spring when the fence was removed. It is elementary that it is essential to the acquisition of title by adverse possession that the claimant be in continuous and uninterrupted possession for the full statutory period, or as it has been stated, "there must be such continuity of possession as will furnish a cause of action for every day during the whole period required to perfect title by adverse possession." *Cathcart v. Matthews*, 105 S. C. 329, 89 S. E. 1021, 1025.

The sufficiency of the possession to comply with the
4 foregoing rule was stated in the *Cathcart case* as follows: "The rule requiring continuity of possession does not mean that the person in possession, his tenant or agent, must be actually on the land during the whole of the

statutory period. Actual possession, once taken, will continue, though the party taking such possession should not continue to rest with his foot upon the soil, until he be dis-seised, or until he do some act which amounts to a voluntary abandonment of the possession." The following is taken from 1 Am. Jur., Adverse Possession, Section 149: "The claimant's possession and its continuity will be sufficient if by his acts and conduct it is apparent to men of ordinary prudence that he is asserting and exercising ownership over the property; and for this purpose it is necessary to take into consideration the nature, character, and location of the property and the uses for which it is fitted or to which it has been put." Other authorities on the question of continuity of possession will be found in a well considered opinion by Mr. Justice Moss in *Mullis v. Winchester*, S. C., 118 S. E. (2d) 61.

In *Mahoney v. Southern Railway*, 82 S. C. 215, 64 S. E. 228, 229, the plaintiff, who was claiming title by adverse possession, rented the land in controversy each year to tenants for cultivation or pasturage. It was held that his possession was not broken by the interval of time elapsing between the departure of the tenant cultivating for one year and the entry of the tenant for the next year. The Court there quoted with approval the following from *Wilson v. McLenaghan*, McMul. Eq. 35:

"Where the occupant of land leaves it for a time, *animo revertendi*, his possession continues during such occasional absence; and so, I apprehend, if a tenant quits the premises, the landlord is to be regarded as still in possession, if by taking possession within a reasonable time, or putting in another tenant as soon as one can be procured, he gives evidence that he does not intend to abandon the land. Here the tenant went out when the crop was gathered, and the landlord went in at that season of the year when planting operations usually begin. Possession is matter of fact, and therefore, of evidence; and here was no greater evidence of abandoning possession than would exist where a planter with-

draws his hands from one plantation to another, during the winter, and returns them in the spring—a thing that often occurs, without the slightest suspicion that the possession has been relinquished.”

For other cases on the question of whether seasonal occupation or use of land satisfies the requirement of continuity, see annotation in 24 A. L. R. (2d) at page 632.

We cannot say as a matter of law under the foregoing authorities that respondents’ possession was broken each year by the removal of the fence. Not only was this a seasonal operation with the *animo revertendi* always present but when the fence was removed, respondents continued to occupy the property by cultivation of the land.

It follows that the finding of the jury on the question of adverse possession and the verdict for damages relating to the land in dispute must be sustained.

Affirmed.

STUKES, C. J., and TAYLOR, LEGGE and MOSS, JJ., concur.

17746

Marian D. AUGHTRY *et al.*, Appellants, v. Gladys M. FARRELL and J. G. Farrell, Respondents

(118 S. E. (2d) 569)

Action to enjoin defendants from maintaining a laundry and dry cleaning pickup station in A-1 single-family dwelling residential zone. The County Court, Greenville County, W. B. McGowan, J., denied requested relief and plaintiffs appealed. The Supreme Court, Taylor, J., held that plaintiffs, who would suffer material impairment in value of their property if defendants were permitted to maintain laundry and dry cleaning station, were specially damaged and could bring injunction action, and that plaintiffs were

not guilty of laches in view of fact that plaintiffs had instituted two actions to halt building and had apprised defendants of their opposition to building of station.

Reversed.

1. ZONING.—Plaintiffs who lived in immediate vicinity of dry cleaning and laundry pickup establishment in residential zone, and who would suffer material impairment in money value of their property if defendants were permitted to maintain and operate laundry and dry cleaning station, were specially damaged and had standing to maintain action to enjoin maintenance of pickup station.
2. ZONING.—Property owners in residential zone, who had prosecuted two actions to prevent defendants from maintaining dry cleaning and laundry pickup station in residential zone were not guilty of laches and could bring action to enjoin building of station where property owners had brought two actions to halt granting of zoning variance and had apprised defendants of their opposition to building of station.

Messrs. Williams & Henry, of Greenville, for Appellants, cite: As to valid zoning ordinances of a city not being altered or suspended by an illegal order of variance granted by a board of adjustment of such city: 75 S. E. 687, 92 S. C. 374. As to error on part of trial Judge in holding that the showing of special damages made by the Appellants was not satisfactory: 27 S. E. (2d) 504, 203 S. C. 430; 70 F. (2d) 377; 208 S. W. (2d) 497; 51 S. E. (2d) 451. As to error on part of trial Judge in holding that special damages must be shown in a case of this character to justify the relief sought: 27 S. E. (2d) 504, 203 S. C. 430; 265 S. W. (2d) 374; 28 S. E. (2d) 270. As to doctrine of estoppel and laches not being applicable to instant case: 70 F. (2d) 377; 28 S. E. (2d) 270; 108 S. W. 257; 57 N. Y. S. 77; 89 S. E. 280, 228 S. C. 182; 156 N. E. (2d) 536; 92 Atl. (2d) 110. As to Appellants being entitled to injunctive relief: 27 S. E. (2d) 504, 203 S. C. 430; 53 So. (2d) 490; 46 S. E. 874.

Frank G. Carpenter, Esq., of Greenville, for Respondents, cites: As to trial Judge properly holding that special damages must be shown in a case of this character to justify

the relief sought: 203 S. C. 353, 27 S. E. (2d) 504. *As to rule that injunction will be refused if the damage to the defendant is great and the benefit to the plaintiff is nominal:* 57 S. E. (2d) 420, 216 S. C. 255.

February 14, 1961.

TAYLOR, Justice.

This appeal arises out of an action brought in the County Court for Greenville County, wherein plaintiffs sought injunctive relief against defendants using a portion of the premises, whereon is situated their home, for business purposes.

Plaintiffs own homes in, and live in, an A-1 single-family dwelling residential zone under the ordinances of the City of Greenville and seek to enjoin the defendants from maintaining and operating a laundry and dry cleaning pickup business from a building constructed on a portion of the lot whereon defendants reside in said zoned area, also an order requiring the removal of this building.

By way of answer, defendants set up a general denial, alleged that the Board of Adjustment of the City of Greenville granted a variance on March 28, 1957, for the construction of a laundry and dry cleaning pickup station and that the property on which the building was located was accordingly no longer in the residential zone referred to in the complaint. Further, that they acted in good faith and in reliance upon the variances granted in constructing the building and interposed the defenses of laches and estoppel.

On March 1, 1957, the defendant, Gladys M. Farrell, applied to the Building Commissioner of the City of Greenville for the issuance of a permit to construct the laundry and dry cleaning pickup station on a designated portion of the aforesaid lot. The application was denied by the Commissioner; and, thereafter, on appeal, the Board of Adjustment of the City granted the requested variance on March 28, 1957. A permit was thereafter issued and construction of

the building was commenced. Plaintiffs then resorted to the Courts; and, on October 31, 1957, the Greenville County Court passed an order relative thereto, holding that the Board of Adjustment had no power or authority to grant the variance because due notice had not been given plaintiffs of the application therefor as required under the ordinances. The order granted the defendant, Gladys M. Farrell, permission to reapply to the Board of Adjustment for a variance and to have a hearing thereon, after due notice to Appellants.

Thereafter, timely application was made to the Board of Adjustment for the variance. A hearing was had on the application, after due notice to Appellants, and the variance was granted.

Plaintiffs then made application for a writ of *certiorari* in the Court of Common Pleas for Greenville County, and upon hearing, Judge Brailsford reversed the Board's order, holding that the granted variance was illegal.

Thereafter, the plaintiffs duly applied to the Greenville County Court for the injunctive relief prayed for in their complaint and on March 23, 1960, the Court, by its order denied the relief and ordered the complaint dismissed; and plaintiffs now appeal.

The property under consideration is 180 feet square and located at the corner of Cleveland Avenue and Ben Street in the City of Greenville. It is bounded on the north by a commercial district fronting west on Cleveland Avenue; east by residential lots fronting south on Ben Street and west by Cleveland Avenue. The residence thereon faces south on Ben Street. The laundry and dry cleaning pickup building is on the northwest corner facing Cleveland Avenue near Sirmine Stadium. Judge Brailsford stated in his order:

"At the request of counsel for all parties, I visited the premises and viewed the building and its location. As one passes the ravine, in traveling south on Cleveland Avenue, it is the only non-residential type building in view. The fact

that it is located in the residential district is apparent. My own impression was that it is conspicuous in its isolation and that it is not harmonious with the neighborhood.

"The only reasonable inference from the record is that the Board failed to adhere to the standards and conditions prescribed by the ordinance, in the particulars stated. Its action in granting the variance is, therefore, illegal and must be reversed. This conclusion makes it unnecessary to consider the numerous other grounds of illegality urged by petitioners."

After determining that the Board of Adjustment had failed to adhere to the standards and conditions prescribed by the ordinance and its action in granting the variance was illegal, the order states that the hearing Judge had no occasion to decide whether petitioners had been "specially damaged" within the rule of *Momeier v. John McAlister, Inc.*, 203 S. C. 353, 27 S. E. (2d) 504, and, further, "Whether the facts proved constitute an estoppel against petitioners is not properly before the Court in this proceeding. If the defense exists, it is personal to the applicant and has no place in the amended return of the Board."

There is no appeal from this order, and it is now the law of the case.

In the order of the County Court for Greenville County now under appeal, reference is made to the foregoing order; and the questions before the Court are stated as being whether the petitioner had been specially damaged within the rule set forth in the *Momeier case*, and whether the doctrine of estoppel and laches was applicable to the facts of this case. The Court concludes that plaintiffs are without authority to maintain this action in that they were able to show only general damages and not such special damages as would justify equitable relief, and, further, that plaintiffs are denied relief under the theory of estoppel and laches.

Judge Brailsford found that the laundry and dry cleaning pickup station located in an A-1 residential zone was con-

spicuous in its isolation and not harmonious with the neighborhood and that the only reasonable inference from the record was that the Board had failed to adhere to the standards and conditions prescribed by the ordinance. The testimony shows that plaintiffs' homes are located near the laundry and dry cleaning pickup station and that in the opinion of a number of witnesses the value of their property has been and will be impaired and decreased by the maintaining and operating of such business.

One real estate broker testified that the value of the property in the immediate neighborhood was affected to the extent of "several blocks," a portion of his testimony being:

"A. * * * Now, from real estate value standpoint, uh, when you jump the ravine and make a breach in that residential pattern, uh, not only does it affect where the building is built on the back and the lots immediately adjacent to it, but psychologically, very definitely you create a doubt in the mind of a would-be purchaser of any property, I would think, for several blocks of the stability of the zoning in that area. Recently, within six months before they started, we sold two homes within, I would say, a half a block of there, and I'm confident that both of those people felt that the zoning was stable. In selling a home a lot of times, unknown fears have more weight than known fears and certainly the people have been led to believe that the shopping area from the ravine north is a convenience. A person can walk around the corner and do their shopping, but that it would never jump the ravine. And so, from a value standpoint and as a real estate broker, it would definitely be my opinion that the break in the pattern, by jumping the ravine and allowing a commercial use in a definitely established zoned residential area, not only created a loss of value to a degree which cannot be determined until a home near there is sold, but it would also create doubt in the mind of purchasers of property in two or three blocks because they feel if it was permitted there maybe next year it would be on the other corner and there is no stopping.

That definitely is a factor people have come in the last three or four years to be very conscious of zoning restrictions.

"Q. Do you feel that this building as now constructed and standing there detracts from the general appearance of the residential area?

"A. Yes, sir. I do."

Plaintiffs' witnesses, eleven in number, substantially corroborated the above and this testimony is uncontradicted.

In *Kellog et al. v. Joint Council of Women's Auxiliaries Welfare Ass'n, Mo.*, 265 S. W. (2d) 374, 376, the question was somewhat similar to that in instant case in that plaintiffs sought to enjoin the operation of a convalescent women's home in a district zoned for single-family residential use, and the Court stated:

"* * * plaintiffs did not actually introduce evidence tending to show their properties are or will be rendered less desirable for residential use or are or will be depreciated in value because of defendant's use as did the plaintiffs allege and show in *Evans v. Roth*, 356 Mo. 237, 201 S. W. (2d) 357. Depreciation of value peculiarly effected to a plaintiff's property, of course, is considered as a special damage different to that of the general public. *Evans v. Roth, supra*. But we think it should not be held that a showing of depreciation of value or of any special pecuniary damage is essential to the maintenance of this action by plaintiffs or that depreciation of value of their property is the only special damage which the plaintiffs herein may suffer. It was shown in evidence that plaintiffs are owners and residents of property in a district zoned for use as 'single-family' dwellings. Plaintiffs have an interest in the continuation and observance of the single-family dwelling classification of the zoned district in which they reside and own property, and it would seem they should be entitled to resort to this equitable remedy to enjoin the violation of the zoning * * * authority in invoking the police power with whatever resultant benefit to them or to their properties. In our opinion, they are

proper party-plaintiffs and may maintain this action to prevent by injunction the violation of the zoning ordinance, by which violation their interest and benefit in some measure may be destroyed. *Polk v. Axton*, 306 Ky. 498, 208 S. W. (2d) 497 and cases therein cited; *Welton v. 40 East Oak St. Bldg. Corp.*, 7 Cir., 70 F. (2d) 377, and cases cited in footnote 2 at page 380; *Snow v. Johnston*, 197 Ga. 146, 28 S. E. (2d) 270; Vol. 2, Yokley, Zoning Law and Practice, § 192, pp. 7-12."

In *Momeier v. John McAlister, Inc.*, *supra*, this Court stated:

"I have a very different view of the testimony, which I have carefully read more than once, relating to the factual issues, from that expressed by Mr. Justice Baker when he says that appellants' testimony at least balanced that of the respondent. I fully concur in the findings of fact of the Circuit Judge; in fact I have no doubt that the preponderance of the evidence was with the respondent and that in addition to the interruptions suffered by him and the members of his family in the usual enjoyment of their home, due to the business activities of the appellants next door, there has been a material impairment in the money value of respondent's property for residential purposes, and there is no testimony that it is of any value for any other purpose. And this depreciation in value is enough alone to constitute respondent a 'specially damaged plaintiff.'" [203 S. C. 353, 27 S. E. (2d) 511].

Considering the evidence in the light of the foregoing, we find that the plaintiffs have shown by the undisputed evidence that those who live within the immediate vicinity will suffer a material impairment in the money value of their property if defendants are permitted to maintain and operate the laundry and dry cleaning pickup station in question, that their damages are not such as are suffered by the public generally but such damages are peculiar to those in the immediate vicinity and they are, therefore, "specially damaged plaintiffs."

Defendants contend further that plaintiffs are pre-
2 cluded from relief under the theory of estoppel and
laches. Defendants, on March 28, 1957, applied for
and were granted a variance by the Board of Adjustment
of the City of Greenville and the building permit issued. This
was contested in the Courts and the variance set aside for
lack of proper notice. Thereafter, defendants reapplied and
were again granted a variance by the Board. The matter was
again carried to the Courts where, after hearing, the second
variance was set aside for the reason that the Board had
exceeded its authority. Defendants, therefore, knew from the
beginning that they were seeking to construct a building
and maintain a business in an A-1 residential zone. It is
undisputed that at the time the foundation of the building
was being laid, one of the neighbors complained. Others tes-
tified that being of the impression that the building was a
garage, they made no immediate protests but did so im-
mediately when the form and shape revealed that it was
not to be a garage. Mr. J. A. Henry, an attorney, wrote de-
fendants on June 4, 1957, protesting and on July 16, 1957,
action was commenced. Upon filing of the order of October
31, 1957, wherein the second variance was declared void,
plaintiffs applied to the Court upon the entire record for the
injunctive relief sought in the action commenced back in
July of that year. It is, therefore, apparent that defendants
were aware that their efforts to break the zone boundary
were being opposed both by word of mouth of the neighbors
who complained personally and by action in the Courts.

Defendants contend that everything done by them shows
that they were acting in good faith, as evidenced by the fact
that when the first variance was set aside by the Courts
they stopped construction immediately and did nothing fur-
ther until they had obtained another variance from the Board
of Adjustment. We find no evidence of bad faith on the
part of any of the parties; but inasmuch as both variances
have been declared invalid, defendants now find themselves
in the position of having constructed the building and main-

taining a place of business in an area zoned for A-1 single-family dwellings, which is in violation of the ordinances of the City of Greenville and, therefore, illegal.

For the foregoing reasons, we are of opinion that plaintiffs have been specially damaged, that under the undisputed facts of this case they have been reasonably diligent in voicing their protests and are not guilty of such laches as would preclude them from maintaining this action, that the order appealed from should be reversed and plaintiffs granted the relief sought; and it is so ordered. Reversed.

LEGGE and MOSS, JJ., concur.

STUKES, C. J., and OXNER, J., did not participate.

17747

JAMES G. AUSTIN, Sr., as Administrator of the Estate of Janie Austin Fry, Appellant, v. Irene Fry SUMMERS, Individually, and Irene Fry Summers, as Executrix of the Estate of Joseph T. Fry, Respondent.

(118 S. E. (2d) 684)

Action by an administrator to recover one-half of the decedent's alleged interest in a joint bank account. From a judgment of the Common Pleas Court, York County, J. Woodrow Lewis, J., entered on the report of special referee, Henry N. Obear, the administrator appealed. The Supreme Court held that a withdrawal by one joint tenant of the entire account and placing the same beyond the reach of other joint tenant and refusal to pay the other joint tenant one-half of the account after demand amounted to a conversion of the share of such other tenant.

Reversed.

1. GIFTS.—To constitute a deposit in the name of the depositor and others a valid gift, there must be intention on part of original owner of fund to make a gift to other joint depositors.
2. JOINT TENANCY.—Where original owner of funds placed names of his wife and daughter on deposit card not for convenience but with

a donative intent, and deposit agreement stated that any funds placed in the account should be conclusively intended to be a gift, daughter and wife of original owner took such account as joint owners thereof with right of survivorship upon death of original owner.

3. **JOINT TENANCY.**—When it is established that two parties have substantial interest in a joint bank account, neither can appropriate the whole without liability to the other.
4. **JOINT TENANCY.**—Withdrawal by one joint tenant of entire account and placing the same beyond reach of other joint tenant and refusal to pay other joint tenant one half of account after demand amounted to a conversion of the share of the other tenant.
5. **ESTOPPEL.**—Joint tenants who made no claim to account after death of original owner of sum deposited in account and who acquiesced in use of funds which were withdrawn by one of co-owners and placed with assets of estate of original owner and used in part for support and maintenance of other co-owner would have been estopped during her lifetime from claiming any interest as a joint depositor in account and her heirs were likewise estopped.
6. **ESTOPPEL.**—Testator's daughter, who treated joint account as asset of estate, waived any claim as a joint depositor.
7. **WILLS.**—Testator's daughter was not entitled as remainderman to recover from estate of testator's wife sums paid out of testator's estate for support and maintenance of testator's wife pursuant to will authorizing full use and enjoyment of estate for support and maintenance of wife.
8. **WILLS.**—Use of words "to have the full use and enjoyment thereof for her maintenance and support and pleasure" implied an intent on part of testator that wife have enough of estate to provide for her maintenance, support and pleasure and did not give wife a mere life estate in property.
9. **SETOFF AND COUNTERCLAIM.**—Testator's daughter, who was a remainderman under testator's will, was entitled to setoff for funeral expenses of wife of testator and debts owed by testator's wife and paid out of testator's estate against a claim against daughter who had withdrawn joint account from bank in which testator's wife was also a co-owner.

Tom S. Gettys, Esq., of Rock Hill, for Appellant, cites: As to right of survivor of joint tenants to savings account: 224 S. C. 445, 79 S. E. (2d) 714; 48 C. J. S., Joint Tenancy, Sec. 3 e (1). As to rule that where owner of money deposited it in a bank in the name of himself and another, the right of the other was a mere power of attorney revocable

by the death of the owner: 124 S. C. 100, 117 S. E. 312. *As to respondent converting the funds of plaintiff's intestate to her own use:* 2 Blackstone Commentaries, 180; 130 N. J. Eq. 176, 21 A. (2d) 743, 161 A. L. R. 80; 14 Am. Jur. 81, Cotenancy, pars. 7, 8; 14 Am. Jur. 86, Cotenancy, par. 14; 14 Am. Jur. (1960 Supplement) 24, Cotenancy, par. 14; 3 Rich. Eq. 1, 55 Am. Dec. 627; S. C. L. (3 Brev.) 97, 5 Am. Dec. 548; 315 Pa. 225, 173 A. 172; 161 A. L. R. 82; 50 N. Y. S. (2d) 861; 332 Pa. 49, 1 A. (2d) 244; 54 Dauph Co. Rep. (Pa.) 255; 159 P. (2d) 211, 161 A. L. R. 66; 7 Am. Jur. (1960 Supplement) 40, Banks; 161 A. L. R. 74, 75.

Messrs. Angus H. Maculay and Charles W. McTeer, of Chester, for Respondent, cite: As to Special Referee having determined that husband of plaintiff's intestate intended to create a joint account with right of survivorship, and this finding of fact has been concurred in by trial Judge: 232 S. C. 268, 101 S. E. (2d) 664; (S. C.) 106 S. E. (2d) 447. *As to the evidence sustaining the findings of the Special Referee and the Lower Court that a joint account with right of survivorship was created by the decedent:* (S. C.) 75 S. E. (2d) 46, 14 A. Jur. 79, 48 C. J. S. 910; 82 W. Va. 9, 95 S. E. 802; (Iowa) 33 N. W. (2d) 410; 104 N. E. (2d) 651; 169 Calif. 287, 146 P. 647; 109 Mont. 477, 98 P. (2d) 377; 335 Ill. App. 86, 80 N. E. (2d) 275; 85 Utah 364, 39 P. (2d) 715; 15 Cal. (2d) 255, 100 P. (2d) 195; (Cal.) 236 P. (2d) 230; 293 Mass. 253, 199 N. E. 896, 103 A. L. R. 1117; 293 Pa. 13, 141 A. 629; 109 N. Y. S. (2d) 144, 279 App. Div. 823; (Ohio) 101 N. E. (2d) 782; 122 Utah 445, 251 P. (2d) 297. *As to the evidence being sufficient to sustain the finding that the estate of plaintiff's intestate was not entitled to recover any part of the deposit:* (S. C.) 70 S. E. (2d) 637; 196 S. C. 438, 13 S. E. (2d) 403, 80 A. L. R. 997; 107 S. C. 369, 92 S. E. 1099; 159 Pac. (2d) 211; 161 A. L. R. 66.

Tom S. Gettys, Esq., of Rock Hill, for Appellant, in Reply, cites: As to the law of right of survivorship in South Caro-

lina: 224 S. C. 445, 79 S. E. (2d) 714; 124 S. C. 100, 117 S. E. 312; Am. Jur. 308, Banks, Sec. 436; 223 S. C. 182, 75 S. E. (2d) 46.

February 15, 1961.

PER CURIAM.

The report of the Special Referee correctly disposes of the questions presented and is adopted as the Opinion of this Court.

STUKES, C. J., not participating.

The report of Special Referee Henry N. Obear follows:

By an Order of Reference dated May 12, 1959, this matter was referred to me as Special Referee to take the testimony and report the same to this Court with findings of fact and conclusions of law thereon, and with leave to report any special matter. Pursuant to this Order I held a reference at Chester, South Carolina, by agreement of the parties to this action, on May 27, 1959, which was attended by the attorneys for the plaintiff and the defendant and, at this reference, took such testimony as was deemed necessary. From this testimony and the evidence received, I find and report as is hereinafter set forth.

This action was commenced on or about October 15, 1958, by the filing of a summons and complaint in the Court of Common Pleas for York County, South Carolina. The plaintiff alleged in substance that he was the administrator of the estate of Janie Austin Fry and that said Janie Austin Fry was the owner of a deposit account of approximately \$10,000.00 which had been placed in the First Federal Savings and Loan Association of Rock Hill, South Carolina, by Joseph T. Fry in an account entitled "Joseph T. Fry, Janie A. Fry and Irene F. Summers, as joint tenants with right of survivorship". The plaintiff alleged that there was no donative intent whereby Irene F. Summers received a share or interest in this deposit as a gift. The plaintiff further alleged that the defendant converted this deposit account to her own

use and asked the Court to require the defendant to account for said funds and that plaintiff have judgment against the defendant in the amount of \$10,189.00, with interest thereon from August 11, 1956.

The defendant answered, setting up that the above mentioned account in the Savings and Loan Association was an account of joint tenancy with right of survivorship and that she, as survivor of Joseph T. Fry and Janie Austin Fry, was entitled to said funds and that Janie A. Fry had no interest therein. The defendant set up as a further defense that she had advanced certain of her funds to Janie A. Fry during her lifetime and that should Janie A. Fry be held to be entitled to any part of said account, the advancements made to her be setoff against any claim that Janie A. Fry might have in said funds.

The plaintiff filed his reply to the plea of recoupment or counterclaim set up by the defendant's answer and asked that the will of Joseph T. Fry be declared of no effect; that Joseph T. Fry be adjudged to have died intestate and that defendant be required to account for all personal property coming into her hands as executrix of the last will of Joseph T. Fry.

It is apparent from the pleadings that the principal issues raised are as follows:

A. What interest did Janie Austin Fry or Irene Fry Summers have in the joint account in the First Federal Savings and Loan Association after the death of Joseph T. Fry?

B. If plaintiff is entitled to all or any part of the joint account in the First Federal Savings and Loan Association, is the defendant entitled to setoff of moneys paid to or for the benefit of Janie A. Fry from the joint account in the Rock Hill National Bank?

Findings of Fact

On or about September 23, 1955 there was on deposit with the First Federal Savings and Loan Association of Rock Hill, South Carolina, the sum of \$10,189.96 in the

name of Joseph T. Fry and Janie Austin Fry, as joint tenants with right of survivorship. This account was closed on September 23, 1955 and on this date a new account was opened in the same institution and in the same amount, this new account being in the names of Joseph T. Fry, Janie Austin Fry and Irene Summers, as joint tenants with right of survivorship and not as tenants in common.

I find that this account was opened by said parties by the execution by all three of a deposit contract or agreement furnished by the depository and in the form identical to that contained in plaintiff's Exhibit 6 and also similar to the form set forth in defendant's answer.

I find that on August 1, 1956, Joseph T. Fry died in York County, South Carolina, leaving in full force and effect his last will and testament dated June 16, 1954, and that same was duly admitted to probate in common form by the Probate Court for York County on August 11, 1956. I find that this will was probated without challenge and that no action has been taken by any person since that date of probate to have same probated in solemn form, and that same is valid and properly probated.

I further find that on August 11, 1956, Irene Summers withdrew from the First Federal Savings and Loan Association of Rock Hill the sum of \$10,497.95, same being the amount of the above mentioned joint account, plus interest, and thereafter deposited same in her name in the First Federal Savings and Loan Association of Burlington, North Carolina. (See page 79 of Minutes of Reference.)

I further find that on January 14, 1958, Janie Austin Fry made a demand in writing on Irene Summers, through her attorney and process agent, for an accounting of the money removed from the First Federal Savings and Loan Association and for a share thereof of \$5,000.00 and accumulated interest thereon.

I further find that Janie Austin Fry died intestate August 8, 1958, leaving as her heirs at law her brothers, James G.

Austin, Sr., the plaintiff herein, and Daniel Austin and London Austin.

I further find that during the lifetime of Janie Austin Fry, she received certain monthly payments from Irene Summers as Executrix of the Estate of Joseph T. Fry, amounting in all to \$1,800.00 and that there was also paid for the benefit of Janie Austin Fry during her lifetime by said Executrix the sum of \$497.25. In addition, Irene Summers, as Executrix of Estate of Joseph T. Fry, paid the sum of \$1,439.75 for the benefit of Janie Austin Fry after the date of her death.

I further find that said payments were made from money in the Rock Hill National Bank and that, at the death of Joseph T. Fry, this deposit or deposits amounted to \$5,-467.45.

I find that the above mentioned deposit or deposits were in said Rock Hill National Bank at the date of death of Joseph T. Fry in the name of J. T. Fry or Mrs. Janie Austin Fry or Mrs. Irene Summers and that following the death of Joseph T. Fry, said deposits were taken into the possession and under the control of Irene Summers, as Executrix of the Estate of Joseph T. Fry and as a part of the personal property of said estate and that same were thereafter used by her, as Executrix, to pay the debts and estate expenses of Joseph T. Fry, as well as to make the payments to and for the benefit of Janie Austin Fry, hereinabove mentioned.

Conclusions of Law

The first issue to be decided in this matter is that of the ownership of the joint account in the First Federal Savings and Loan Association of Rock Hill after the death of Joseph T. Fry and, in order to make this determination, it is necessary to establish from the evidence and testimony the intention of the depositors and whether there was a contractual relationship between the parties sufficient to transfer an estate or interest in the account to either or both of the parties surviving Joseph T. Fry.

Ownership of joint accounts and the rights of the survivor or survivors are usually determined by the Courts under what is sometimes called the "gift, trust or contract theories". The gift element, or the intention of the person creating the joint deposit to make a gift is generally considered in arriving at a determination of the question of ownership of the deposits, although in the so-called contract theory cases, the gift element has been minimized and the contract under which the deposit is created is emphasized. See 7 American Jurisprudence (Banks), page 299 *et seq.*; 48 A. L. R. 189 *et seq.*; 103 A. L. R. 1124 and *Hawkins v. Thackston*, 224 S. C. 445, 79 S. E. (2d) 714.

The cases generally hold that, to constitute a deposit
1 in the name of the depositor and another a valid gift, there must be intention to make the gift, but in some cases the title of the donee, which could not be sustained upon the ground that the deposit in the joint names of the owner and donee constituted a valid gift, has been upheld upon the theory that the owner was holding the deposit in trust for his co-depositor, the making of the joint deposit being held to constitute proof of an intention to create a trust. In some jurisdictions, the right of a co-depositor to funds deposited by the owner thereof in an account in the name of the owner and the co-depositor has been upheld on the theory that under the contract between the depositors and the bank, the co-depositor is entitled to the deposit on the death of the original owner of the funds deposited. However, even in these cases, there must be an intention on the part of the original owner of the funds to make a gift to the other joint depositors. 7 Am. Jur. (Banks), page 308; 48 A. L. R. 206.

In the case at hand, the record discloses that Joseph T. Fry, Janie Austin Fry and Irene Summers entered into a written deposit contract or agreement with the First Federal Savings and Loan Association of Rock Hill when the joint deposit in question was created on September 23, 1955. This agreement was on a deposit card furnished by the Savings

and Loan Association and this card was signed by all three parties.

While the plaintiff attempted to show throughout the testimony that the execution of the deposit agreement was not a voluntary and free act on the part, at least, of Janie Austin Fry, and there is considerable testimony as to hesitancy and reluctance on her part in this connection—there is no showing of fraud or of the use of undue influence or duress which would void her action in this respect. The evidence shows that Janie Austin Fry consulted with her brother, the plaintiff herein, who was her attorney in fact and apparently her advisor, and thereafter signed the card creating this joint deposit, although the record shows that she received no direct advice from her brother to sign or to refuse to sign. He left the matter to her judgment and she, in the exercise of her judgment, applied her signature to the card.

Further, there is no evidence in the record to show that Janie Austin Fry was not mentally capable of executing this deposit agreement, or that she was not able to understand the nature of her act.

Accordingly, I can only conclude and so find that the deposit agreement was valid and binding, not only between the parties and the First Federal Savings and Loan Association, but between the parties themselves. In this connection, the following portion of this agreement is important in the determination of the question of intent and of the contractual rights which were created between the parties and affecting the rights of any one of the joint depositors to the deposit:

“* * * It is agreed by the signatory parties with each other and by the parties with you (First Federal Savings and Loan Association) that any funds placed or added to the account by any one of the parties is and should be conclusively intended to be a gift at that time of such funds to the other signatory party or parties to the extent of his or their pro rata interest in the account.”

Throughout the reference the plaintiff has contended that, irrespective of the above agreement, the addition of the name of Irene Summers to the joint account of Joseph T. Fry and Janie Austin Fry was made merely for purposes of convenience and was without donative intent of any kind and, therefore, no interest or title whatsoever passed to Irene Summers in the joint account in question. However, the evidence shows that the account in the First Federal Savings and Loan Association was not regularly used for expense money by Joseph T. Fry or his wife. There is no showing of any withdrawals therefrom before September 23, 1955 and none between that date and the death of Joseph T. Fry. The evidence does show, however, that about nine months before this joint account was created with the name of Irene Summers thereon, Joseph T. Fry had changed his will to such an extent that under its terms his daughter would share in his estate along with his wife, indicating an intent or desire on his part at that time for his daughter to be the recipient of a portion of his property after his death. In this connection it is important to note that the testimony shows the money making up this Savings and Loan Association account was entirely his originally. It is not improbable to conclude from these facts that Joseph T. Fry desired his daughter to receive a share of the Savings and Loan account which would not have passed to her without the addition of her name thereto.

In view of this I can only conclude, and so find that

2 the name of Irene Summers was placed on the First Federal Savings and Loan Association account, not for convenience, but with a donative intent and, by reason of this and the language of the deposit contract, Janie Austin Fry and Irene Summers took said account, as joint owners thereof, with right of survivorship upon the death of Joseph T. Fry. See *Hawkins v. Thackston*, 224 S. C. 445, 79 S. E. (2d) 714.

As a joint owner of this account, did Irene Summers
3 have a right to withdraw the entire account on August 11, 1956 and to deposit same in her individual account, and did this amount to a conversion of property of Janie Austin Fry? It is clear that both Janie Austin Fry and Irene Summers had substantial and equal interests in this account following the death of Joseph T. Fry. Neither had contributed the money making up this account which, under several decisions, gives the contributing party greater rights of withdrawal without liability. See 161 A. L. R. 75. When it has been established that both parties have substantial interests in a joint account, it follows that neither can appropriate the whole without liability to the other. 7 Am. Jur. (Banks) 1959 Supplement, page 39. Also 161 A. L. R. at pages 74-75.

The contract of deposit, referred to above, undoubtedly authorized Irene Summers to withdraw the entire amount of the account without liability on the part of the Savings and Loan Association to the other party and this is also sanctioned by statute, as set forth in Section 8-602 of the 1952 Code of Laws of South Carolina. But the power to withdraw is one thing and the power or right to destroy a co-interest is another. The removal of this account in full by Irene Summers and redeposit of same in her own name in North Carolina, clearly placed the money, or any part of it, outside of the control and possession of Janie Austin Fry and beyond her reach. As a joint tenant having a substantial interest in this account, Janie Austin Fry could have terminated the account by a withdrawal of one-half thereof, or by a voluntary partition or agreement with her co-owner. See 14 Am. Jur. (Cotenancy) page 86. She was entitled to withdraw one-half of the account without becoming liable in any way to Irene Summers and Irene Summers could have withdrawn her half share in like manner. Had Janie Austin Fry taken no action to sever this account, or to claim any part thereof during her lifetime, it cannot be questioned but that Irene Summers, as the survivor, would have taken the entire

account on the death of Janie Austin Fry. However, the record shows that Janie Austin Fry did make an effort to secure her part of this account during her life, having made written demand on Irene Summers for an accounting of the money removed from the joint Savings and Loan Association account and for \$5,000.00 of this account. Had Janie Austin Fry lived, she could have enforced this demand by a partition action or, if the money had not been removed from the joint account, by merely withdrawing her share. Clearly, she wanted her share and was rightfully entitled to same, but was prevented from obtaining same by the action of Irene Summers in removing the money to an individual account in another State.

I therefore conclude and so find, that the action of
4 Irene Summers in withdrawing the entire account from the First Federal Savings and Loan account and placing same beyond the reach of Janie Austin Fry and her further failure to pay to Janie Austin Fry one-half of this account, after demand was made upon her, amounts to a conversion of the share of Janie Austin Fry in this account. In effect, her action amounted to an appropriation of the entire account. Janie Austin Fry was entitled to one-half of the account of \$10,497.95, or the sum of \$5,248.97, with interest thereon from August 11, 1956.

The next issue to be decided in this matter is that of the right of the defendant to claim a set off or recoupment for money expended by her to and for the benefit of Janie Austin Fry against any sum she might be required to pay to the plaintiff.

The testimony and exhibits establish the fact that, at the date of the death of Joseph T. Fry, there was on deposit in the Rock Hill National Bank in a savings account the sum of \$1,328.67 and in a checking account the sum of \$4,153.88 or a total of \$5,482.55 (See plaintiff's Exhibit No. 8). The evidence shows that this money was originally owned by Joseph T. Fry, but on September 23, 1955 the account was

changed to include the name of Irene Summers. At the date of the death of Joseph T. Fry the accounts were in the name of J. T. Fry or Mrs. Janie Austin Fry or Mrs. Irene Summers, but thereafter were changed to Mrs. Janie Austin Fry or Mrs. Irene Summers. It is undisputed that, as Executrix of the will of Joseph T. Fry, Irene Summers returned the above accounts as property of the estate of Joseph T. Fry, same appearing on both the Petition to Prove the Will and in the Appraisement, although in both the total of the accounts was shown to be \$5,467.45, and thereafter used same to pay debts, probate costs and administrative expenses of this estate, as well as funeral expenses of Joseph T. Fry, amounting in all to \$1,771.67. She also used this money to the extent of \$1,800.00 to make monthly payments to Mrs. Janie Austin Fry at the rate of \$75.00 per month from August 18, 1956 to June 30, 1958. In addition, Irene Summers as Executrix of the Estate of Joseph T. Fry, paid from this fund in various amounts a total of \$1,937.00 for the benefit of Janie Austin Fry. Of the last mentioned amount, \$1,439.75 was paid after the death of Janie Austin Fry in settlement of her debts and funeral expense. (See first and final annual returns of Irene Summers as Executrix of Estate of Joseph T. Fry and checks supporting same, being defendant's exhibits 4, 5 and 8.) Note: Checks numbered 3, bank charge, 6, 7, 8, 9, 11, 13, 14, 15, 18, 21, 22, 25, 26, 31 and 58 cover items paid for benefit of estate of Joseph T. Fry. (\$1,771.67.) Checks numbered 24, 28, 34, 35, 36, 37, 39, 40, 42, 43, 44, 46, 48, 49, 50, 54, 55, and 56 cover items paid during lifetime of Janie Austin Fry, other than the monthly payments, of which there are 24 at \$75.00 shown on the returns. (\$493.65.) Checks numbered 59, 60, 62, 63 and 64 and \$391.75 unnumbered check, cover items paid by the Executrix of Estate of Joseph T. Fry for benefit of Janie Austin Fry after her death. (\$1,439.75.)

The record shows that the accounts in the Rock Hill National Bank mentioned above were established in the man-

ner indicated by the three parties signing a deposit card containing among other language, the following:

"Depositor hereby agrees that funds deposited in this account are owned jointly by the undersigned, subject to withdrawal by either or both, and that at the death of either, the survivor shall take absolute and single ownership of the net balance then remaining." (See plaintiff's Exhibit No. 10.)

In accordance with the applicable law and the findings and conclusions in connection with the ownership of the joint account in the First Federal Savings and Loan Association, it would ordinarily be determined that this account belonged jointly and equally to Janie Austin Fry and Irene Summers immediately after the death of Joseph T. Fry. If, however, there was no claim to same and no withdrawals therefrom by Janie Austin Fry during her lifetime, it became the sole property of the survivor, Irene Summers on the death of Janie A. Fry. The record does not show any claim having been made by Janie Austin Fry to this fund during her lifetime, as was the case with the deposit in the First Federal Savings and Loan Association, nor did she withdraw or attempt to withdraw any money therefrom during her life. However, the fact that this fund was placed with the assets of the estate of Joseph T. Fry by one of the co-owners and benefits were directly received therefrom in the form of support and maintenance payments which were received by Janie Austin Fry might well have influenced her attitude and actions relating thereto. She acquiesced in the use of these funds as estate money and further recognized that these accounts belonged to the estate of her husband by seeking court assistance to obtain increased benefit payments therefrom. I conclude from this that Janie Austin Fry would have been estopped during her lifetime by her actions relative to this money from claiming an interest as a joint depositor in the accounts in the Rock Hill National Bank, and that her heirs, being in privity with her, are bound by an estoppel which was binding upon her. 19 Am. Jur. (Estoppel) page 811.

It is also clear that the defendant has consistently
6 treated this account as property of Joseph T. Fry and as an asset of his estate. She waived any claim or interest as a joint depositor in Rock Hill National Bank accounts after the death of Joseph T. Fry and maintained this position until after the death of Janie Austin Fry. No personal withdrawals were made therefrom and all payments made therefrom were drawn by her as Executrix of the estate of Joseph T. Fry. I can only conclude that Irene Summers voluntarily and willingly transferred any interest she might personally have had in this joint account to the estate of Joseph T. Fry and that these funds in the Rock Hill National Bank became actual funds of the estate by the action of the co-owners after the death of Joseph T. Fry.

I find no merit in plaintiff's contention that the will of Joseph T. Fry is invalid and not properly probated. The record shows that the will was properly executed, attested and was duly admitted to probate in common form on August 11, 1956, by the Judge of Probate for York County. As required by Section 19-225 of the 1952 Code of Laws of South Carolina, challenge to this probate must be made within prescribed time by seeking to have same probated in due form of law. This was not done. See *Davis v. Davis*, 214 S. C. 247, 52 S. E. (2d) 192, at page 196.

The defendant claims that under the provisions of
7 the will of Joseph T. Fry, Janie Austin Fry was a mere life tenant in the property of the estate and that she, as the daughter of the testator, was the remainderman and entitled to the entire property of the testator, subject only to payment of income and interest from this property to the life tenant. Accordingly, it is defendant's contention that payments made from the funds of the estate, that is, the corpus of the estate, to and for the benefit of Janie Austin Fry, were actually paid from property to which she, as remainderman, was entitled and that she, in effect, used her own money to support Janie Austin Fry. This is the basis for her demand to set-off.

I have carefully considered the will of Joseph T. Fry
8 and I am of the opinion and so conclude and find that
it is the intention of the testator to grant to his wife,
Janie Austin Fry, something more than a mere life estate
in his property. His use of the words "to have the full use
and enjoyment thereof for her maintenance and support and
pleasure" implies an intent that his wife have enough of his
estate to provide for her maintenance, support and pleasure.
It is obvious that this could not be accomplished on the in-
come and interest from his property alone.

The intention of the testator is not changed by his use of
precatory words in the second paragraph of his will. Words
of this nature, which express desire rather than any manda-
tory direction, are to be construed in accordance with tes-
tator's intention. 57 Am. Jur. (Wills) page 771. I consider
that the testator's intention is shown by the entire instru-
ment and not by either paragraph examined alone.

Since Janie Austin Fry was entitled to "maintenance and
support" from the corpus of the estate and, as I have deter-
mined hereinabove, the accounts in the Rock Hill National
Bank became estate funds, payments made therefrom after
the death of Joseph T. Fry to and for the benefit of Janie
Austin Fry during her lifetime, were from funds of the es-
tate of Joseph T. Fry and not from individual or personal
funds of Irene Summers, or from money to which she was
exclusively entitled at that time as remainderman. Accord-
ingly, I conclude that Irene Summers individually made no
payments to or for the benefit of Janie Austin Fry during
the lifetime of the latter and is therefore not entitled to set
off any part of these payments against the share of the ac-
count formerly in the First Federal Savings and Loan As-
sociation of Rock Hill, which I have concluded is due to the
plaintiff in this action.

However, certain payments in the amount of \$1,439-
9 .75 were made by Irene Summers as Executrix of the
Estate of Joseph T. Fry for the benefit of Janie T.

Fry after the death of the latter from estate funds of Joseph T. Fry, deceased. These payments covered funeral expenses and debts owed by Janie Austin Fry. There was no legal obligation created by the will of Joseph T. Fry requiring the Executrix to make these payments and such payments directly benefit the heirs of Janie Austin Fry, upon whom these obligations would normally have rested. By making these payments the amount which Irene Summers would have received as remainderman after the life estate created by the will of Joseph T. Fry was decreased by the total of such payments. Thus, in effect, Irene Summers paid for the benefit of the estate of Janie Austin Fry the sum of \$1,439.75. I therefore conclude and so find that she is entitled to set off this amount, with interest from August 8, 1958, against the amount which the plaintiff may be entitled to recover from the defendant.

I recommend that this Court do enter its order requiring payment by the defendant in this action of the amount herein determined to be due to the plaintiff, less that amount which has been established herein to be due by the plaintiff, representing the estate of Janie Austin Fry, to the defendant. I further recommend that Irene Summers, as Executrix of the Estate of Joseph T. Fry, be directed by the Court to make her final accounting to the Probate Court of York County and that she be allowed to be discharged as such Executrix.

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H. A. MADDEN and Ruby M. Sellars, Appellants, v. Edna S. MADDEN, Individually and as Executrix, etc., *et al.*, Respondents
(118 S. E. (2d) 443)

Action by certain heirs of testator against the widow individually and as executrix to have her adjudged a trustee for herself and others of testator's real and personal property owned at the time of his death. The County Court of Greenville County, W. B. McGowan, J., entered a judg-

ment adverse to the plaintiff heirs and they appealed. The Supreme Court, Legge, J., held that the evidence did not support the finding that testator lacked testamentary intent at time of execution of properly witnessed second will, and a duly executed will was not invalid because at the time of execution testator may have intended to change it later.

Reversed and remanded.

1. **APPEAL AND ERROR.**—Matters not passed on by trial court were not properly before Supreme Court for review.
2. **WILLS.**—The evidence did not support the finding that testator lacked testamentary intent at time of execution of second will which was kept together with earlier will until testator's death.
3. **WILLS.**—Duly executed will may not be invalidated for lack of testamentary intent because testator at time of execution intended to change it, and unless he executes a later will or revoking will in a legal manner, instrument stands as his last will and testament.
4. **WILLS.**—Where document may be interpreted either as a will or some other type of instrument, extrinsic evidence is admissible to show maker's intent.
5. **WILLS.**—When *animus testandi* existed at time of execution will became at that moment a valid testamentary instrument which was ambulatory and revocable.
6. **WILLS.**—Testator who executed valid will did not by retaining earlier will or by being uncertain as to which will he might ultimately use effect revocation of later will. Code 1952, § 19-221.

Messrs. George F. Townes and Leo H. Hill, of Greenville, for Appellants, cite: As to testamentary intent of testator when he executed Will of September 19, 1957: 208 S. C. 520, 38 S. E. (2d) 762; 114 S. C. 275, 103 S. E. 562; 86 S. C. 477, 68 S. E. 1049; 82 S. C. 40, 625 S. E. 254; 132 S. C. 63, 128 S. E. 850; 21 S. C. L. (3 Hill) 68; Page on Wills, Sec. 59, Bowe-Parker Revision Vol. I, p. 180. As to a constructive trust being imposed on the property devised to the beneficiary under the second Will: Bogert, Trusts and Trustees 499, Vol. V, pp. 269-272, 285-286; Powell on Real Property, Vol. IV, pp. 576-587; Rich. Eq. Cas. 146 (22 S. C. R.); 54 Am. Jur. 242; 200 S. C. 279, 20 S. E. (2d) 741; 62 C. J. 470, 472; 65 C. J. 485, 486; 202 S. C. 139, 24 S. E. (2d) 168; 65 C. J. 456, 457.

Messrs. Hinson & Hamer and Leatherwood, Walker, Todd & Mann, of Greenville, for Respondent, Edna S. Madden, cite: As to a Will, not drawn animo testandi, failing to revoke a prior Will: 2 Nott & McCord 482; 131 S. C. 352.

February 16, 1961.

LEGGE, Justice.

The controversy here concerns the disposition of property owned by M. E. Madden, a resident of Greenville County, at the time of his death on October 10, 1958. Mr. Madden was survived by his widow, Edna S. Madden, and by two children of a former marriage, namely: H. A. Madden and Ruby M. Sellers. He had executed a will on March 27, 1953, and another on September 19, 1957. The latter was admitted to probate in common form on October 16, 1958, and thereupon the said Edna S. Madden, who had been named therein as executrix, qualified as such.

On June 5, 1959, H. A. Madden and Ruby M. Sellers brought this action in the court of common pleas against Edna S. Madden individually and as executrix and joined as defendants two children of each plaintiff, as representatives *in esse* of contingent beneficiaries under the 1957 will. The case was thereafter transferred, by consent, to the County Court of Greenville County, and testimony was taken before the judge of that court on November 10, 1959. From his order of December 16, 1959, which at the request of counsel he held in abeyance to permit further argument, and which he confirmed by supplemental order dated March 31, 1960, the plaintiffs have appealed.

The complaint sought to have Edna S. Madden adjudged trustee, for herself and the other parties, of the property real and personal, owned by E. M. Madden at the time of his death. Its first two paragraphs relate to the situs of the property and the status of the parties. Paragraphs III and IV read as follows:

"III. M. E. Madden died on the 10th day of October, 1958, leaving in full force and effect his last will and testa-

ment dated September 19, 1957, which was duly proved and admitted to probate in the Probate Court in the County of Greenville, South Carolina, on the 16th day of October, 1958. This will and other records of the estate of M. E. Madden, deceased, are contained in Apt. 690, File 23, in the Probate Court. A copy of this will is attached to this complaint and designated as Exhibit No. 1. The contents of Exhibit No. 1 are incorporated by reference as a part of the allegations of this paragraph.

"IV. Prior to the execution of the will in Paragraph III, M. E. Madden had executed his will and testament dated in 1953, which will, prior to its revocation, was the valid and existing last will and testament of M. E. Madden. The provisions of this will in substance were that Edna S. Madden, the wife of M. E. Madden, took the home place on Wilson Street in fee simple absolute; that all the rest and residue of the real and personal property of M. E. Madden was devised and bequeathed one-fourth to H. A. Madden, his son, one-fourth to Mrs. Ruby M. Sellers, his daughter, and the remaining one-half to Edna S. Madden his wife."

The allegations of the succeeding paragraphs are, in substance, as follows:

V. That on or about September 19 and 20, 1958, M. E. Madden announced to his wife and his son and his daughter that he wished to execute a new will giving the home place to his wife for life, with remainder in fee to his son and daughter in equal shares, and giving his property, other than the home place, one-half to his wife and one-fourth to each of his said two children. "Edna Madden stated that these proposed provisions were objectionable to her, but that she would accept the provisions of the will described in Paragraph IV. She further stated that said will (described in Paragraph IV) was still in existence and in her possession, and that she would honor and respect its provisions and treat it as though it were the valid and existing will of M. E. Madden."

VI. That in reliance upon his wife's said promise "M. E. Madden assented to the conditions of the promise and did not then revoke or change his second will, having been induced to believe that the property would be distributed in accordance with the terms of the will set forth in Paragraph IV"; and that the parties present at the said family conference "agreed in the presence of the deceased that a distribution of the property would be made according to the terms of the will set forth in Paragraph IV and that as a result of this promise it would not be necessary to revoke the will set forth in Paragraph III nor to make a new will."

VII. That Edna S. Madden has refused to honor her promise to hold the property of her deceased husband "under the provisions of the will set forth in Paragraph IV, and has asserted complete title to all the property of M. E. Madden to the exclusion of the plaintiffs." That Edna's promise was made fraudulently, "for the purpose of inducing M. E. Madden not to revoke his will so that she might benefit from the terms of said will." And that as the result of her fraudulent acts she has been unjustly enriched.

Paragraph VIII alleges that a fiduciary relationship existed between M. E. Madden and his wife Edna S. Madden.

Paragraph IX describes the real property alleged to have belonged to M. E. Madden at the time of his death.

The prayer is: (1) that the court "declare Edna S. Madden to be trustee of the property owned by M. E. Madden at his death for herself and for the plaintiffs in accord with the provisions of the will of M. E. Madden set forth in Paragraph IV of this complaint"; (2) that she be ordered to execute a proper deed and bill of sale "conveying to the plaintiffs their interest in said property to which they would be entitled under the provisions set forth in Paragraph IV"; (3) for such further relief as may be equitable and proper.

Edna S. Madden, answering the complaint:

1. Admitted the execution by M. E. Madden of his will dated September 19, 1957, the admission of said will to probate and her qualification as executrix thereof;

2. Admitted the execution of the 1953 will and alleged upon information and belief that after the execution of the 1957 will Mr. Madden retained the earlier one in his possession because he "was undecided as to which of the two wills should constitute his last will and testament";

3. Admitted that on or about September 19, 1958, M. E. Madden, having expressed dissatisfaction with the 1957 will, conferred with her and the plaintiffs and they all agreed that the will that he had executed in 1953 should constitute his last will and testament, that all parties would honor and respect its provisions, "and, as alleged in Paragraph V of the complaint, that plaintiffs and the defendant would treat said will as the valid and existing will of the said M. E. Madden";

4. Acknowledged her readiness and willingness to "carry out the agreement alleged by plaintiffs in Paragraph V of the complaint", and "to have said will referred to in Paragraph V of the complaint admitted to probate as the last will and testament of the said M. E. Madden in lieu of the will heretofore offered for probate"; and, by way of prayer,

5. Joined "with plaintiffs in requesting permission to admit to probate the will of M. E. Madden, deceased, dated in 1953, in lieu of the will heretofore offered for probate, and for such other and further relief as to the court may seem meet and proper."

Of the four defendants other than Edna S. Madden, two who were minors, answered by their respective guardians ad litem, denying all allegations of the complaint and demanding strict proof thereof. The other two defendants, Miriam Madden and Mayse Sellers Dorsey, joined in the prayer of the complaint.

From the face of the pleadings, one could hardly imagine a more friendly lawsuit. Edna, ignoring the plaintiffs' accusation of fraud, admits the family agreement which she is charged with having repudiated, *viz.*, that all hands should

abide by the provisions of the 1953 will; she alleges her readiness and willingness to carry out that agreement; and she prays that the 1953 will be admitted to probate in lieu of the later will. (Actually, she does not "join with plaintiffs" in requesting permission to admit the 1953 will to probate, for the plaintiffs had requested nothing of the kind. Their complaint sought not the admission of the 1953 will to probate, but the enforcement of an alleged family agreement for distribution of the estate according to its terms despite the existence and probate of the later will.)

But at the trial the scene changed. Where before all had seemed sweetness and light, now was perhaps less sweetness, but certainly more light; for when the 1953 will was introduced in evidence by the plaintiffs it became apparent that its provisions were not what the plaintiffs in their complaint had alleged them to be. By that will the testator had devised the home place to his wife, Edna, as was alleged in Paragraph IV of the complaint; but, contrary to the allegations of that paragraph, he had bequeathed all of his personal property (which the testimony indicated was substantial) to his wife, absolutely, and had devised only his real estate (other than the home place) one-half to his said wife and one-fourth to each of his two children.

As to the family conference referred to in the plead-

1 ings the testimony of the parties was conflicting.

Whether or not at that conference an enforceable agreement was reached with regard to nontestamentary disposition of Mr. Madden's property after his death, and, if so, what the provisions of that agreement were and whether or not they should be effectuated by impressing a trust upon the property in the hands of Edna S. Madden individually and as executrix, were matters not passed upon by the trial judge. They are, therefore, matters not properly before this court. *Carter v. Peace*, 229 S. C. 346, 93 S. E. (2d) 113; *Simonds v. Simonds*, 229 S. C. 376, 93 S. E. (2d) 107; *Branham v. Miller Electric Co.*, S. C., 118 S. E. (2d) 167.

The trial judge held that at the time of the execution of the 1957 will "the testator did not intend that the same should revoke the former will"; that he never thereafter manifested such intent; and that he "had not reached an intention in his own mind as to which of the two wills in question would constitute his last will and testament" until the family conference of September 19 or 20, 1958, at which time "he reached a conclusion as between the two wills" by selecting the earlier one.

We note, in passing, that it was nowhere in the 2, 3 pleadings alleged that the 1957 will was invalid for lack of testamentary intent. But, aside from that, we are of the opinion, after careful consideration of the entire record, that the trial court's holding just mentioned, viewed as a finding that testamentary intent was absent at the time of the execution of that will, was without adequate evidentiary support. The only testimony tending toward such finding was that of the defendant Edna S. Madden, to which we now refer. After she had testified that she had accompanied her husband to the office of the attorney who prepared the 1957 will, that her husband had carried with him the former will (which had been drawn by another attorney), and that when the signing of the new will had been concluded the attorney had, at Mr. Madden's request, given the earlier will back to him, Mrs. Madden's attorney propounded to her, without objection, the following question: "I will ask you if at that time your husband requested—handed both wills to you with the request that you keep them, put them away, that he didn't know which one he was going to use?" To this suggestion she replied: "Yes; he handed them to me and told me to keep them." Then she was asked: "Did you carry out his instructions?" And her reply was: "Yes." It is thus apparent from her testimony that this conversation between the testator and herself took place after the 1957 will had been executed; and it suggests not that the will that he had just executed was invalid, but rather that he considered it a valid testamentary, and therefore revocable,

instrument, to become effective upon his death unless in the meantime he should decide to "use" the earlier will to effect his testamentary dispositions. A will duly executed and declared by a testator to be his will is not invalidated for want of testamentary intent because at the time of its execution he may have intended to change it later. Until he consummates that intention by the execution of a later will that is in existence at the time of his death, or revokes it in some other manner prescribed by law, it stands as his last will and testament. Cf. *Henderson v. Henderson*, 183 Va. 663, 33 S. E. (2d) 181.

The remaining evidence convincingly shows that the 1957 will was executed *animo testandi*. The attorney who drew it and was one of the witnesses to its execution so testified. The will itself so expressly declared: its opening words were: "I, M. E. Madden * * * being of sound and disposing mind and memory, do hereby declare this to be my last will and testament, hereby revoking all other wills and testaments by me heretofore made." It made positive disposition of the testator's property, effective at his death. Its execution was attested by three witnesses who, over their signatures, declared that it had been "signed, sealed and published by M. E. Madden as and for his last will and testament * * *." Cf. *Lyles v. Lyles*, 2 Nott & McC. 531, 11 S. C. L. 531; *Meier v. Meier*, 208 S. C. 520, 38 S. E. (2d) 762. And Mrs. Edna S. Madden, upon advice of counsel who had prepared it and attended to its execution, herself presented it for probate and qualified as executrix thereof, making oath, as required by Section 19-432 of the Code of Laws, that it was the "true last will" of the said M. E. Madden.

Where a document is, upon its face, susceptible of
4 interpretation as either a will or some other type
of instrument, extrinsic evidence is generally admitted to show what the maker intended it to be. *Wheeler v. Meray*, Bailey Eq. 507, 8 S. C. Eq. 507; *Hargroves v. Meray*, 2 Hill Eq. 222, 11 S. C. Eq. 222.

The rule in some jurisdictions is that where the document is testamentary upon its face and its language raises no ambiguity as to the existence of the maker's intent, *animus testandi* is conclusively presumed and extrinsic evidence upon the issue is inadmissible. In others, extrinsic evidence upon the issue of testamentary intent is permitted in proper cases despite the fact that the language of the document clearly indicates that it is testamentary in character. The subject is fully discussed and annotated in 21 A. L. R. (2d) at pages 319 *et seq.*, where reference is made to many decisions on both sides of the question. Extended review of them is unnecessary here because the question of admissibility of such evidence was not raised in the case at bar. But, assuming its admissibility, we think that such evidence, when offered to negate testamentary intent where the will has been executed in due form by a mentally competent testator not influenced or coerced or controlled by outside force, should be clear, cogent and convincing. By no lesser degree of proof should parol evidence be permitted to outweigh the sanction of so solemn an act. The testimony of Edna S. Madden falls short of that standard, and furnished no adequate basis for the conclusion that the 1957 will had been executed without testamentary intent.

The order under appeal, having thus declared the 1957 will invalid, proceeded to hold that at the family conference the testator, having both wills in his possession and being uncertain as to which of them he intended to use, decided, with the acquiescence of the three beneficiaries named in both, to use the earlier one, and that, although he did not physically destroy the later one, he did so in effect, and thus revoked it, by announcing such decision. And the order held, on both the grounds mentioned, that the 1953 will was the last will and testament of M. E. Madden and that it should be admitted to probate in lieu of the 1957 will.

The conclusion that the 1957 will was revoked at the
5, 6 family conference is manifestly inconsistent with the
holding that it was invalid for lack of testamentary

intent, for if it was invalid there was nothing to revoke. We think that the holding as to revocation was erroneous. *Animus testandi* existing at the time of its execution, the 1957 will became at that moment a valid testamentary instrument. As such, it was ambulatory and revocable, but its effectiveness awaited only its existence, unrevoked, at the time of the testator's death. Neither his retention of the earlier will, nor his uncertainty as to whether he might ultimately decide to use the earlier will in its stead, nor his decision, if such there was, to use the earlier will, could effect such revocation. He could revoke it only by one of the methods prescribed in Section 19-221 of the 1952 Code as amended (48 Stat. at L. 1745), which reads:

"No will or testament in writing of any real or personal property or any clause thereof shall be revocable but by some other will or codicil in writing, or other writing declaring the same, attested and subscribed by three witnesses as required by § 19-205, or by destroying or obliterating the same by the testator himself, or some other person in his presence, and by his directions and consent."

We have carefully considered the cases of *Taylor v. Taylor*, 2 Nott & McC. 482, 11 S. C. L. 482, and *Kollock v. Williams*, 131 S. C. 352, 127 S. E. 444, upon which the trial judge based his order and upon which respondents rely in their brief; but the facts in those cases differed widely from those in the case at bar, and the principle of law there announced (with which we are in full accord) is not applicable to the factual situation here.

In the *Taylor case* the testator had made a will in 1810. On July 15, 1816, when he was absent from home and critically ill, he executed another, after much importuning; he expressed dissatisfaction with it on the same day, and on the next day, July 16, he personally cancelled it, tearing his name from it; another will was presented to him that evening, but he was too weak to sign it; early the next morning he died. The Court of Ordinary, following the rule

of the civil law that the execution of a second will annihilates the first and that to establish revival of the first requires evidence other than the destruction of the second, admitted to probate the will of July 15, 1816, and rejected that of the 1810. That decree was reversed by the circuit court, and the judgment of the latter court was affirmed on appeal. The opinion held:

1. That the rule of the civil law was not applicable, the case being governed by the common law, whereby the earlier will is presumed to be restored to its active energy by the cancelling of the later one; and

2. That the evidence supported the jury's finding that the 1816 will had been "acquiesced in by the testator to avoid importunity, and not *animo testandi*." (It is apparent from the facts stated in the report that the jury's finding was based not upon evidence of lack of testamentary intent in the sense applicable to the instant case, but upon proof of coercion and undue influence overcoming the dying testator's power to think and act freely.)

In *Kollock v. Williams*, the testatrix, who had executed a will on May 8, 1918, executed another on June 15, 1918. After her death a few months later, the will of June 15 not having been produced or otherwise accounted for, the circuit court, confirming the judgment of the probate court which had admitted the will of May 8 to probate in due form of law, held:

1. That the evidence showed that the testatrix had destroyed the will of June 15, *animo revocandi*; and

2. That under the common law rule approved in *Taylor v. Taylor*, *supra*, the will of May 8 had not been revoked by the execution of the will of June 15, the revocatory clause in the latter being testamentary in character and therefore not effective *in praesenti*.

Upon appeal, this court, affirming: rejected appellants' contention that after June 15 the testatrix lacked mental capacity to destroy the latter will *animo revocandi*; held

that the evidence sustained the trial court's contrary finding; and declared that that court had correctly concluded, under the rule approved in *Taylor v. Taylor*, that the execution of the later will had not of itself operated to revoke the former.

The order appealed from is reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

TAYLOR, OXNER and MOSS, JJ., concur.

STUKES, C. J., not participating.

17749

William T. WEST and Ruby R. West, Respondents, v. Hubert
SOWELL and Walker Gainey, Appellants
(118 S. E. (2d) 692)

Action by an automobile owner and his wife for injuries received when their automobile struck preceding truck, which was making a right turn. The Common Pleas Court, Lancaster County, James Hugh McFaddin, J., rendered a judgment for the plaintiffs, and the defendants appealed. The Supreme Court, Moss, J., held that the evidence raised questions for the jury as to the negligence of the two drivers.

Exceptions overruled; judgment affirmed.

1. **APPEAL AND ERROR.**—In reviewing refusal of motions for nonsuit, directed verdict, judgment *non obstante veredicto* and new trial, Supreme Court considers testimony and reasonable inferences therefrom favorably to respondents.
2. **NEGLIGENCE.**—Contributory negligence is for jury unless evidence is susceptible of only one reasonable inference.
3. **AUTOMOBILES.**—Approaching intersection on left of center line and turning right without being in proper position or giving signal were negligence *per se*. Code 1952, §§ 46-388, 46-402, 46-405 to 46-407.
4. **AUTOMOBILES.**—Whether truck driver struck from behind was negligent in approaching intersection on left of center line and turning

right without being in proper position or giving signal was for jury. Code 1952, §§ 46-388, 46-402, 46-405 to 46-407.

5. AUTOMOBILES.—Whether motorist who struck preceding truck making right turn was negligent in traveling too fast, failing to have automobile under control, and following too closely was for jury. Code 1952, §§ 46-361, 46-393.
6. AUTOMOBILES.—Leading motorist must exercise ordinary care not to stop, slow up, turn or swerve without adequate warning, and following motorist must exercise ordinary care to avoid collision. Code 1952, §§ 46-361, 46-388, 46-393, 46-402, 46-405 to 46-407.

Messrs. D. Glenn Yarborough, of Lancaster, and Murchison, West & Marshall, of Camden, for Appellants, cite: As to rule that negligence of defendant must be proximate cause of accident before recovery may be had against defendant: 234 S. C. 59, 106 S. E. (2d) 883. As to effect of failure to give a signal, in relation to proximate cause, in rear end collisions: 29 A. L. R. (2d) 77. As to plaintiffs being guilty of such contributory negligence as would bar recovery as a matter of law: 225 S. C. 460, 182 S. E. (2d) 685; 225 S. C. 405, 82 S. E. (2d) 515; 231 S. C. 578, 99 S. E. (2d) 402.

Messrs. James H. Howey and Williams & Parler, of Lancaster, for Respondents, cite: As to question of negligence, in instant case, being one of fact and for determination by jury: 187 S. C. 281, 197 S. E. 313; 97 S. E. (2d) 205; 217 S. C. 383, 60 S. E. (2d) 695; 215 S. C. 404, 55 S. E. (2d) 522; 101 S. E. (2d) 252; 233 S. C. 288, 75 S. E. (2d) 598.

February 27, 1961.

Moss, Justice.

These two actions, arising out of the same automobile accident, were tried together by consent of the parties and resulted in verdicts for actual damages in favor of the respondents, who are husband and wife. The accident occurred at about 7:30 o'clock A. M. on October 10, 1958, on Highway No. 903, about one and one-half miles west of Flat Creek School in Lancaster County, South Carolina, when

a Ford automobile owned by the respondent, William T. West, and driven by the respondent, Ruby R. West, collided with the rear of a Ford truck owned by Hubert Sowell, and operated at the time and place by Walker Gainey, an agent and servant of Sowell. William T. West brought his action against Hubert Sowell and Walker Gainey, appellants, to recover damages to his automobile. The action of Ruby R. West was to recover damages for personal injuries sustained by her.

Timely motions for a nonsuit and a directed verdict were made on three grounds: (1) That there was no evidence of actionable negligence on the part of the appellants; (2) That if there was negligence on the part of the appellants, such was not the proximate cause of the injury and damage to the respondents; and (3) That the respondents were guilty of contributory negligence. These motions were refused. After the rendition of the verdict, the appellants moved for judgment *non obstante veredicto*, or, failing in that, for a new trial upon the same grounds as above stated. The motion was refused and this appeal followed. The question for determination by this Court is whether the trial Judge erred in refusing the motions of the appellants.

The question of whether or not there was error in 1, 2 refusing the motions of the appellants for a nonsuit, directed verdict, judgment *non obstante veredicto*, and, alternatively for a new trial, requires us to consider the testimony and the reasonable inferences to be drawn therefrom in a light favorable to the respondents. If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. However, if the evidence is susceptible of only one reasonable inference, the question is no longer one for the jury but one of law for the Court. Ordinarily, contributory negligence is an issue for the jury and it rarely becomes a question of law for the Court. We have also held that if the only reasonable inference to be drawn from all the testimony is that the negligence

of the complainant is a direct and proximate cause of his injury and damage, or that such negligence contributed as a direct and proximate cause, then it would be the duty of the trial Judge to order a nonsuit or direct a verdict against the plaintiff. We have also held that if the inferences properly deducible from controverted evidence are doubtful, or tend to show both parties guilty of negligence, and if there may be a fair difference of opinion as to whose act proximately caused the injury complained of, then the question must be submitted to the jury. *Green v. Bolen*, 237 S. C. 1, 115 S. E. (2d) 667.

The complaints in these actions charge that a Ford truck owned by the appellant Hubert Sowell and operated by Walker Gainey was being driven west on Highway 903, just ahead of the automobile owned by William T. West and operated by Ruby R. West. It is further alleged that when the driver of the said truck reached an intersecting road, that he negligently attempted to make a right turn off of Highway 903, and in so doing, drove to the left of the center line of said highway as if to make a left turn and then suddenly cut back and made a right turn in front of the automobile of the respondents. It was further charged that the driver of the truck failed to give a proper signal indicating that a right turn was to be made at the intersection. It is asserted that these acts of negligence of the appellants proximately caused the car driven by Ruby R. West to collide with the rear end of said truck, with resulting damage to the respondents.

The answer of the appellants contained a general denial and also alleged as a defense that the injury to the respondents was caused and occasioned by their contributory negligence in failing to have their automobile under proper control, and in following the appellants' truck too closely on the highway, and in failing to apply the brakes to avoid hitting the truck of the appellants.

It appears from the testimony that Ruby R. West was employed at Grace Bleachery of the Springs Cotton Mills,

in Lancaster, South Carolina. On the morning of October 10, 1958, at about 7:30 A.M., Ruby R. West driving an automobile belonging to her husband William T. West, and accompanied by four of her fellow employees, was traveling over and along Highway 903 on the way to work. This car was being driven about three car lengths back of the truck of the appellants; both the car and truck were traveling west on Highway No. 903, and approaching an intersecting secondary road. It was the intention of the driver of the truck to turn right onto the said secondary road. The testimony in behalf of the respondents shows that when the truck approached the intersection, where the collision occurred, the driver first pulled four to six inches to the left of the center line of said highway, indicating to the driver of the automobile that the truck intended to turn left, and then, without any signal or warning by the driver of the truck, it suddenly turned to the right. Ruby R. West testified that in an effort to avoid striking the rear of the truck, that she attempted to drive to the left of said truck, but in so doing, collided with the left rear thereof. The driver of the truck testified that he did not drive to the left of the center line of said highway and that he gave a hand signal indicating a right turn, but admitted on cross examination it would have been impossible for the driver of the car following the truck to see the hand signal given by him due to the construction of the body of the truck. A witness for the respondents testified that immediately following the collision that he went to the truck of the appellants and that the glass in the door on the driver's side was rolled down about one to one and one-half inches from the top. This testimony indicated that the driver of the truck could not have given the statutory hand signal of his intention to turn right for the reason that the closed window would prevent the giving of such signal.

Typical of the testimony in behalf of the respondents as to what the driver of the truck did at the intersection is as follows:

"He pulled over. Both dual wheels across the yellow line and the white line on the left-hand side and suddenly the truck made a turn to the right right across in front of Mrs. West who was driving very close to the shoulder of the road on her side, but not off the pavement."

It is provided in section 46-388 of the Code that no vehicle shall at any time be driven to the left side of the road when approaching within one hundred feet of an intersection.

Section 46-402 of the Code provides that the driver of a vehicle intending to turn at an intersection shall do as follows:

"(1) Right turns.—Both the approach for a right turn and a right turn shall be made as close as practical to the right hand curb or edge of the roadway;"

Section 46-405 of the Code provides:

"No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon a roadway as required in §§ 46-402 and 46-403 or turn a vehicle to enter a private road or roadway or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety."

Section 46-406 of the Code provides:

"No person shall turn any vehicle without giving an appropriate signal in the manner herein provided in the event any other traffic may be affected by such movement. A signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning."

Section 46-407 of the Code provides the method of giving hand and arm signals and for a right turn the hand and arm shall be extended upward.

Considering the evidence in behalf of the respondents, in the light most favorable to them, it is sufficient to support the view that the driver of the truck violated Section 46-388 by approaching the intersec-

tion of two highways on the left of the center line thereof, and violated Section 46-402 by failing to approach an intersection for a right turn as close as practical to the right hand edge of the roadway, and violated Section 46-405 by turning the truck at the intersection without having it in proper position as required by Section 46-402, and violated Sections 46-406, 46-407, by turning the truck without giving the appropriate hand and arm signal of his intention so to do. A violation of these sections of the Code constitutes negligence *per se* and such negligence is actionable if it proximately caused injury to the respondents. *Field v. Gregory et al.*, 230 S. C. 39, 94 S. E. (2d) 15.

The appellants assert that the respondents were guilty of contributory negligence as a matter of law and that such constitutes a complete defense to these two actions. They assert that the driver of the automobile of the respondents violated Section 46-361 of the Code, which provides:

"No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care."

The appellants also assert that the respondents violated Section 46-393 of the Code, which provides:

"The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

We think that the conflict in the evidence required the 4, 5 trial Judge to submit to the jury the issue of negligence and contributory negligence. *Woods v. Wilhelm*, 232 S. C. 108, 101 S. E. (2d) 252; *Howle v. Woods*,

231 S. C. 75, 97 S. E. (2d) 205; *Dean v. Temptron, Inc.*, 234 S. C. 532, 109 S. E. (2d) 167.

All drivers of vehicles using the highways are held
6 to the exercise of due care. A leading vehicle has no absolute legal position superior to that of one following. Each driver must exercise ordinary care in the situation in which he finds himself. The driver of the leading vehicle must exercise ordinary care not to stop, slow up, turn, nor swerve from his course without adequate warning to following vehicles of his intention so to do. The driver of the following vehicle must exercise ordinary care to avoid a collision with the leading vehicle. Just how close to a vehicle in the lead a following vehicle, ought, in the exercise of ordinary care, be driven, just what precautions a driver of such a vehicle must in the exercise of ordinary care take to avoid colliding with a leading vehicle which slows, stops, turns, or swerves in front of him, just what signals or warnings the driver of a leading vehicle must, in the exercise of due care, give before stopping, slowing up, turning, or swerving up his intention to do so, may not be laid down by any hard and fast or general rule. In each case except when reasonable minds may not differ, what due care so required, and whether it was exercised, is for the jury. This is such a case. *Cf. Cardell v. Tennessee Electric Power Co.*, 5 Cir., 79 F. (2d) 934.

The exceptions of the appellants are overruled and the judgment of the lower Court is affirmed.

TAYLOR, OXNER and LEGGE, JJ., concur.

17750

Nora Jackson BLACKWELL, as Administratrix of the Estate of Edmund B. Blackwell, Respondent, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant
(118 S. E. (2d) 701)

Action on policy affording collision coverage. The County Court, Richland County, Legare Bates, J., rendered judgment on directed verdict for plaintiff, and defendant appealed. The Supreme Court, Oxner, J., held that, under circumstances, including fact that mortgagor had covenanted to keep property insured, mortgagee had equitable lien (to extent of mortgage indebtedness) on insurance proceeds payable when mortgaged automobile was involved in collision.

Judgment reversed and case remanded with directions.

1. INSURANCE.—Under circumstances including fact that mortgagor had covenanted to keep property insured, mortgagee had equitable lien (to extent of mortgage indebtedness) on insurance proceeds payable when mortgaged automobile was involved in collision.
2. INSURANCE.—If mortgagor is bound by covenant in mortgage, or otherwise, to insure mortgaged premises for better security of mortgagee, latter has equitable lien, on money due on policy taken out by mortgagor, to extent of mortgagee's interest in property damaged or destroyed.
3. INSURANCE.—Mortgagee's equitable lien, on money due on policy taken out by mortgagor, arises solely from unperformed contract to protect, the theory being that since equity regards as done that which ought to have been done, if mortgagor, having so covenanted, fails to make insurance payable to mortgagee, or to assign same, fund arising therefrom is within operation of maxim.
4. INSURANCE.—Insuring automobile itself and adding premium to amount of note was not mortgagee's only remedy for breach by mortgagor of covenant to insure.
5. INSURANCE.—Rule giving mortgagee equitable lien on money due on policy taken out by mortgagor is not affected by fact that covenant to insure provides that if mortgagor fails to procure insurance and have same made payable, as agreed, mortgagee may take out policy of insurance at expense of mortgagor.
6. INSURANCE.—If collision insurer, with knowledge of covenant by mortgagor to insure for benefit of mortgagee, had, without mort-

gagee's consent, paid amount of loss to mortgagor, right of mortgagee to enforce its equitable lien against proceeds of policy would not have been affected, and mortgagee could have recovered against insurer amount of loss.

7. **INSURANCE.**—Covenant by mortgagor, to buy insurance policy containing clause providing that in event of loss payment should be made to mortgagee as its interest might appear, was sufficient to create equitable lien on proceeds of any loss payable under terms of policy.

Messrs. Nelson, Mullins & Grier, of Columbia, for Appellant, cite: As to the mortgagee having an equitable lien on any proceeds payable under the policy to the extent of the mortgage indebtedness: 119 S. C. 1, 111 S. E. 805; 52 S. C. 309, 29 S. E. 722, S. C. Law Quarterly, Vol. 10, pp. 267-270.

John Sloan, Esq., of Columbia, for Respondent, cites: As to plaintiff being entitled to payment of full amount of collision policy on mortgaged automobile where plaintiff is sole loss payee or named insured: 4 Appleman, Insurance Law and Practice, Sec. 2268, Note 9; 136 S. C. 144, 134 S. E. 263; 175 S. C. 42, 178 S. E. 254; 119 S. C. 1, 111 S. E. 805; 56 S. C. 355, 34 S. E. 449. As to mortgagee having no equitable lien: 161 S. C. 450, 159 S. E. 807.

February 28, 1961.

OXNER, Justice.

This is a suit on an insurance policy which, among other coverages, contained a provision insuring E. B. Blackwell against loss or damage to his automobile caused by collision or upset. The question for determination is whether the insurer has discharged its liability by paying the amount of the loss to the First National Bank of South Carolina, which held a chattel mortgage on the automobile.

The insured, E. B. Blackwell, purchased a Plymouth automobile from Pulliam Motor Company of Columbia. He borrowed from the First National Bank \$748.90 for the purpose of paying the unpaid portion of the purchase price amounting to \$700.00, together with an insurance premium of \$48-

.90. This loan was evidenced by a note to the bank for \$833.34, dated Janaury 7, 1958, payable in monthly installments of \$46.43 each, beginning February 22nd, which was secured by a chattel mortgage on the automobile. (Interest to maturity was included in the amount of the note). This mortgage contained the following provision:

"The mortgagor agrees to pay all taxes and all assessments of any kind whatsoever on the property, and to keep the same insured against fire and theft for not less than the amount of the unpaid balance due on said note, also to carry comprehensive insurance including collision hazard insurance, satisfactory to the Mortgagee, and to keep the property so insured during the life of the mortgage, the policies of insurance to contain a clause that in the event of loss, payments shall be made to the Mortgagee as its interest may appear. Upon the failure of the Mortgagor in any of these respects, the Mortgagee may at its option, either declare this mortgage in default and the outstanding balance due and payable, or may pay said taxes, or so insure, and the costs thereof shall become a part of the debt secured by this mortgage. The proceeds of any insurance, whether paid by reason of loss, injury, return premium or otherwise, shall be applied toward the repair or replacement of the property or payment of the obligation secured by this mortgage, at the option of the Mortgagee."

When the loan was made, the Bank immediately applied to the State Farm Mutual Automobile Insurance Company for comprehensive and collision coverages on the automobile and paid the premium of \$48.90. The Company issued to the bank a "binder receipt", acknowledging payment of the premium and agreeing to issue the policy requested "with loss payable to the First National Bank of South Carolina." Several weeks later the policy was issued and delivered to the Bank with a copy to the insured. It provided: "If a mortgage owner, conditional vendor, or assignee is named in the exceptions, loss, if any under coverages (D), (F), and (G) shall be payable to the named insured and to such

additional interest as such interest may appear, * * *.” (G) was the collision coverage. Attached to the printed policy was a rider giving the policy number, policy period, amount of premium, etc. and naming the insured as E. B. Blackwell. Under the heading “Exceptions and Endorsements”, there appeared the following: “Finance—First National Bank of South Carolina, Columbia, South Carolina.”

On January 25, 1958, before any monthly installment became due, Blackwell's automobile was involved in a collision with another automobile, resulting in some damage to his car. Before it was moved a third automobile collided with it, causing additional damage. Blackwell and the Company agreed that the damage to his car was \$425.00 but disagreed as to the extent of liability under the policy. The Company took the position that there were two separate collisions and since the policy had a \$100.00 deductible clause, there should be deducted from the loss \$200.00. Blackwell contended, upon the advice of counsel, that there should be only one deduction of \$100.00, making the Company's liability \$325.00. Blackwell died on February 26, 1958 before the dispute was settled. The only asset left by him was the insured automobile. After waiting some time for the administratrix of Blackwell's estate and the Insurance Company to settle, the Bank finally demanded payment of the loss and on January 28, 1959 the Insurance Company paid it the sum of \$225.00.

This action was instituted by the administratrix on August 31, 1959. On the trial of the case each party made a motion for a directed verdict. The Court below refused that of the Insurance Company and directed a verdict for the plaintiff in the sum of \$325.00, representing the loss of \$425.00 less \$100.00 under the deductible clause. No question is raised on this appeal as to whether this deduction should be \$100.00 or \$200.00. It is stated in the record that the sole question “is whether or not respondent was entitled to a directed verdict for \$325.00, the admitted amount of the loss payable under the policy.”

The correctness of the conclusion of the Court below depends upon what interest, if any, the Bank had in the proceeds of the insurance. Appellant contends (1) that the policy provisions have the same effect as the ordinary loss payable clause, and (2) that apart from the insurance contract, the covenant to insure contained in the chattel mortgage gave the Bank an equitable lien on the proceeds to the extent of its mortgage indebtedness. Accordingly, it is argued by appellant that under either view the Insurance Company was justified in paying the amount of the loss to the Bank. Respondent says that the insurance contract was one solely between Blackwell and appellant and that the loss was payable to Blackwell alone. Respondent argues that Blackwell's obligation was "to keep the property insured during the life of the mortgage" and if he failed to do so, the Bank had two remedies—"one was to declare the note due in full; the second remedy was to insure the car themselves and add the premium therefor on the note and they did neither one."

We find it unnecessary to determine whether the policy provisions have the same effect as a loss payable clause, for we think it is clear that under the circumstances, the Bank had an equitable lien on the insurance proceeds to the extent of the mortgage indebtedness, amounting, after crediting an interest refund, to \$786.42, which was far in excess of the sum of \$325.00 which respondent claimed was the proper amount of the loss.

It is well settled that if the mortgagor is bound by covenant in the mortgage or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property damaged or destroyed. *Swearingen v. Hartford Fire Insurance Co.*, 52 S. C. 309, 29 S. E. 722; *Farmers' & Merchants' National Bank of Lake City v. Moore*, 135 S. C. 391, 133 S. E. 913, 47 A. L. R. 1001; Annotation 92 A. L. R. 559. On page

561 of this annotation, it is stated: "This equitable lien arises solely from the unperformed contract to protect, the theory being that since equity regards as done that which ought to have been done, if the mortgagor, having so covenanted, fails to make the insurance payable to the mortgagee, or to assign the same, the fund arising therefrom is within the operation of the maxim."

There is no merit in respondent's contention that the
4, 5 Bank's only remedy for the breach of the contract to insure was to insure the car itself and add the premium to the amount of the note. As pointed out in the above annotation and in *Farmers' & Merchants' National Bank of Lake City v. Moore, supra*, the rule giving an equitable lien is not affected by the fact that the covenant to insure provides that if the mortgagor fails to procure insurance and have the same made payable as agreed, the mortgagee may take out a policy of insurance at the expense of the mortgagor.

Under *Gibbes Machinery Co. v. Niagara Falls Insurance Co.*, 119 S. C. 1, 111 S. E. 805, 21 A. L. R.
6 1460, if appellant, with knowledge of the covenant to insure for the benefit of the Bank, had without its consent, paid the amount of this loss to Blackwell, the right of the Bank to enforce its equitable lien would not have been affected and the Bank could have recovered against appellant the amount of the loss.

Respondent seeks to distinguish the phraseology of
7 the covenant under consideration from that considered in some of the cases by arguing that Blackwell did not expressly agree to insure the car "for the benefit of the bank or assign the policy or make the bank a joint payee" but we think the covenant here was entirely sufficient to create an equitable lien on the proceeds of any loss payable under the terms of the policy.

It follows that whatever liability there may be under the policy must be credited with the sum of \$225.00 paid to the

Bank. Therefore, the Court below erred in directing a verdict for respondent for \$325.00, which is the full amount of the loss payable under the policy. That is the only question now presented. We leave undecided the question of the liability, if any, of appellant for the further sum of \$100.00, representing the difference between the amount paid to the bank and the amount which respondent claims was due under the terms of the policy, and if such liability exists, to whom it should be paid. *Cp. Riley v. Federal Insurance Co.*, 60 Ga. App. 764, 5 S. E. (2d) 246.

Judgment reversed and the case remanded for further proceedings in accordance with the views herein expressed.

TAYLOR, LEGGE and MOSS, JJ., concur.

17751

Mike COSTAS, Respondent, v. FLORENCE PRINTING COMPANY,
Inc., Appellant
(118 S. E. (2d) 696)

Merchant's libel action against a newspaper. The Civil Court of Florence County, William T. McGowan, Jr., J., rendered judgment upon overruling a demurrer to the complaint, and the defendant appealed. The Supreme Court, Moss, J., held that a newspaper article stating that a fight between persons guilty of disorderly conduct took place in the plaintiff's business premises was not libelous *per se*.

Reversed.

1. PLEADING.—On demurrer, court is limited to consideration of pleadings under attack, and all factual allegations thereof properly pleaded are admitted.
2. PLEADING.—A demurrer does not admit inferences drawn by party from his allegations, and court determines whether they are justified.
3. LIBEL AND SLANDER.—Extrinsic facts giving defamatory import to words not actionable on their face must be set forth and connected with words charged.

4. LIBEL AND SLANDER.—Newspaper article stating that fight between disorderly persons took place in plaintiff's business premises was not libelous *per se*.
5. LIBEL AND SLANDER.—Merchant's libel complaint pleading no lost customers or diminution in trade did not plead special damages.
6. APPEAL AND ERROR.—Interlocutory appeal may be taken from order overruling demurrer on ground that complaint failed to state cause of action. Code 1952, § 7-422.
7. APPEAL AND ERROR.—Appeal from order overruling demurrer to complaint stayed further proceedings where trial judge did not find that ends of justice would be served by proceeding to trial. Code 1952, § 7-422.

Messrs. McEachin, Townsend & Zeigler, of Florence, for Appellant, cite: As to notice of appeal from an order dismissing a demurrer acting as a stay to proceedings in the lower Court: Black's Law Dictionary (3rd Ed.), 1657; 76 S. E. 115; 96 S. C. 460, 81 S. E. 144. As to trial Judge abusing his discretion in allowing a third amendment of the complaint: 1 C. J. S. 1417, Actions, Sec. 137; 230 S. C. 239, 95 S. E. (2d) 262; 81 S. C. 574, 62 S. E. 1113. As to trial Judge erring in holding that the alleged libelous words imputed that plaintiff was conducting a business where disorderly conduct was permitted: 53 C. J. S. 93, Libel and Slander, Sec. 43; 172 S. C. 101, 172 S. E. 761. As to error on part of trial Judge in holding that it was for the jury to determine whether the alleged libelous words were libelous per se: 53 C. J. S. 335-336, Libel and Slander, Sec. 223; 237 S. C. 116, 115 S. E. (2d) 664; 179 S. C. 474, 184 S. E. 145; 178 S. C. 278, 182 S. E. 889.

Messrs. Yarborough & Parrott, of Florence, for Respondent, cite: As to trial Judge properly holding that the publication, when liberally construed, was susceptible of the imputation that plaintiff was conducting a business where disorderly conduct was permitted: 192 S. C. 373, 9 S. E. (2d) 750; 37 C. J. 50, 51. As to rule that where the language used is ambiguous or susceptible of two meanings, the jury must determine in which sense they were used: 237 S. C. 116, 115 S. E. (2d) 664; 148 S. C. 249, 146 S. E. 8; 134

S. C. 276, 132 S. E. 587; 178 S. C. 278, 182 S. E. 891; 192 S. C. 373, 9 S. E. (2d) 750. *As to the complaint stating a cause of action that is actionable per se*: 189 S. C. 243, 200 S. E. 848; 192 S. C. 373, 9 S. E. (2d) 750; 134 S. C. 198, 132 S. E. 584; 33 Am. Jur. 41, Sec. 6.

March 6, 1961.

Moss, Justice.

Mike Costas, the respondent herein, brought this action against Florence Printing Company, Inc., the appellant herein, the publisher of the "Florence Morning News", a daily newspaper, seeking the recovery of actual and punitive damages by reason of its publication on August 18, 1959, of an alleged libelous article concerning him.

The appellant made a motion to make more definite and certain parts of the said complaint and to strike other portions thereof. When the motion came on to be heard before the Honorable William T. McGowan, Jr., Judge of "The Civil Court of Florence", the respondent agreed to amend his complaint, and such amended complaint was served on September 9, 1960. The appellant demurred to the amended complaint, and, reserving his rights under the demurrer, made a motion to require the respondent to make his complaint more definite and certain and to strike portions of such amended complaint. The Trial Judge heard the demurrer and the motion, it being stipulated that the appellant would reserve its rights to appeal should the Court dismiss the demurrer. The Court, by its order dated October 8, 1960, overruled the demurrer. Notice of intention to appeal from such order was duly served. Thereafter, the respondent served "Amended Complaint Number Two". The appellant demurred to this complaint. While the demurrer and appeal from the order of October 8, 1960 was pending, the respondent moved to amend further the complaint by alleging special damages. This motion was granted by the Trial Judge on December 1, 1960, and "Amended Complaint Number Three" was served. Timely appeal from this last order was duly given.

The complaint alleges that the appellant is engaged in the printing and publishing of the "Florence Morning News", a daily newspaper with wide circulation in eastern South Carolina. It is also alleged that the respondent is engaged in business as a merchant, being the owner and operator of the Airport Drive-In, located just east of the City of Florence, South Carolina, and that he was of good name, fame and credit. It is further alleged that on August 18, 1959, an article appeared in said newspaper entitled "Youths Fined for Fighting", which said article gave a purported account of the proceedings in a Magistrate's Court on August 17, 1959, and there was maliciously published of and concerning the respondent and his business the following words, which were false and defamatory:

"This was the second fight within a week at the drive-in. On August 10, Jimmy Harper, 17, and Laverne Powell, 18, of Florence, were charged with disorderly conduct.

"Harper and Powell, along with two other Florence youths have been charged with the armed robbery of a gas station in Moncks Corner Friday night."

The complaint also asserts that the respondent, over a period of years, has established a reputable business, one that is acceptable by parents for their children to visit; that he does not allow boisterous conduct or misconduct at his place, nor does he sell beer, tolerate profanity or permit any act or conduct which would be detrimental to the morals of the youth of the area. It is further alleged that on April 3, 1957, that the appellant published another false article in its newspaper concerning misconduct of patrons at respondent's place of business. The respondent asserts that after the publication of the previous article that he conferred with the editor of said newspaper and warned him not to again publish untrue articles relative to respondent's place of business, and, in spite of such warning, the above mentioned article was willfully, intentionally and maliciously published, with the intention to damage the respondent and his business, and

that the publication of the aforesaid article has damaged and injured the respondent.

The appellant demurred to the amended complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action in that the alleged libelous words are not actionable *per se* and the complaint contains no allegation of special damages, and no allegation of the way in which any special damages resulted from the publication. As is heretofore stated, the Trial Judge overruled the demurrer, stating:

"It is my opinion that the language is susceptible of a charge that plaintiff was operating a place of business where disorderly conduct occurred frequently among teenagers and other young people. The complaint charges that such imputation is false and that the publication was willfully and maliciously made. Therefore, it is my opinion that the complaint does state a cause of action and that it will be for the jury to determine whether or not the words used are libelous *per se*."

The Trial Judge struck from the complaint the allegations thereof that the appellant had previously published a false article in its newspaper concerning the misconduct of patrons at respondent's place of business, and that the respondent had advised the editor of the falsity thereof and warned against the publication of any future untrue articles. He held, however, which seems somewhat inconsistent, that the appellant was entitled to have the amended complaint made more definite and certain by stating wherein the previous article published on April 3, 1957 was false and untrue.

The first question for determination is whether the publication complained of is libelous *per se*. It is the position of the appellant that the publication is not libelous *per se*, and since there is no allegation of any special damage, the demurrer should have been sustained.

It is elementary that in passing upon a demurrer, the
1, 2 Court is limited to a consideration of the pleadings under attack, all of the factual allegations whereof

that are properly pleaded are for the purpose of such consideration deemed admitted. However, a demurrer does not admit the inferences drawn by the plaintiff from such facts and it is for the Court to determine whether or not such inferences are justified; that is, to determine if the language used in the publication can fairly or reasonably be construed to have the meaning attributed to it by the plaintiff. *Drakeford v. Dixie Home Stores*, 233 S. C. 519, 105 S. E. (2d) 711.

In the case of *Flowers v. Price*, 192 S. C. 373, 6 S. E. (2d) 750, this Court held that a demurrer is the proper procedure to test the actionable character of the charge and it will only be sustained where the Court can affirmatively say that the publication is incapable of any reasonable construction which will render the words defamatory; and to the extent that the demurrer tests the actionable quality of the words it is an admission of the allegations of the complaint.

In the case of *Jackson v. Record Publishing Co.*, 175 S. C. 211, 178 S. E. 833, 835, this Court said:

“When the language alleged to be libelous, or slanderous, is plain and unambiguous, and admits of but one reasonable construction, it becomes a matter of law for the action and determination of the court. If said language be ambiguous, or doubtful of meaning, it should be left to the jury to determine in what sense it was used, and what its meaning is.

* * *

“The inference of hurt arising out of facts in order to become actionable must be such an inference as is established by the general consent of men, and the inference must be judged of by the Court in the first instance.” 17 R. C. L., 264; *McGregor v. State Co.*, 114 S. C. 48, 53, 103 S. E. 84.”

In the case of *Whitaker v. Sherbrook Distributing Co.*, 189 S. E. 243, 200 S. E. 848, 849, this Court said:

“In order to render words libelous *per se*, their injurious character must appear upon their face. The nature of the language used must be such that the Court can legally pre-

sume without proof that the plaintiff has been damaged as a natural, necessary, and proximate consequence from the use of the words employed in the publication. The words must be of such a character that a presumption of law will arise therefrom that the plaintiff has been degraded in the estimation of his friends or of the public, or has suffered some other loss either in his property, character, reputation or business or in his domestic or social relations. *McClain v. Reliance Life Insurance Co.*, 150 S. C. 459, 148 S. E. 478; *Duncan v. Record Pub. Co.*, 145 S. C. 196, 143 S. E. 31.

"Therefore, the real practical test, by which to determine whether special damage must be alleged and proven in order to make out a cause of action for libel, is whether the language is such as necessarily must, or naturally and presumably would, occasion the damages in question."

If the alleged defamatory words are not actionable
3 on their face, but derive their defamatory import from extrinsic facts and circumstances, such extrinsic facts and circumstances must be set forth and connected with the words charged by proper averment. *Hubbard v. Furman University*, 76 S. C. 510, 57 S. E. 478. In the case of *Spigener v. Provident Life & Accident Ins. Co.*, 148 S. C. 249, 146 S. E. 8, it was held that a demurrer to a complaint should be sustained where the words alleged were not libelous *per se* and there was no allegation of special damage or extrinsic facts and circumstances which would make the words libelous. In the case of *Prickett v. Western U. Tel. Co.*, 134 S. C. 276, 132 S. E. 587, 588, quoted with approval in the *Spigener case*, it appears that a demurrer to the complaint was sustained because the words published were not libelous *per se*. The Court said "If they are not, it is clear that no special damages are alleged, and no extrinsic circumstances are alleged which would render libelous *per se* words which otherwise are not, and the complaint is therefore demurrable."

In the case of *McGregor v. State Co.*, 114 S. C. 48, 103 S. E. 84, 85, a druggist brought action for an alleged libel-

ous publication. The State Company demurred to the complaint and such was sustained. In affirming the judgment of the lower Court, it was said:

"To constitute actionable libel: (1) The writing must have been inspired by malice; (2) it must have tended to impeach the reputation of McGregor; and (3) thereby to injure his business. All the authorities so agree, and it ought not to be necessary to cite them.

"The complaint alleges malice. The further allegation of the complaint is that the publication was 'libelous'; but so much is the statement of a legal conclusion, and not of a fact. However, the publication may have been false and malicious, and yet not actionable. Nott, J., in *Mayrant v. Richardson*, 1 Nott & McC. [347], 351. It is true the complaint alleges that the publication tended to impeach the reputation of the plaintiff and to injure his business, but that bald allegation does not make the publication actionable, else a confessedly harmless act may be converted into a harmful act by a mere allegation.

"The inference of hurt arising out of a statement of facts in order to become actionable, must be such an inference as is established by the general consent of men, and the inference must be judged of by the Court in the first instance. Odger on Libel and Slander, p. 25; 17 R. C. L. 264."

In the instant action, the amended complaint, to which the demurrer was interposed, charged that the appellant "maliciously intending to injure plaintiff in his business, and * * * with the intention to damage plaintiff and his business," composed, edited and published the article above quoted.

We have 'examined the alleged libelous article set
4 forth in the complaint herein and it contains no statement from which it could be reasonably implied that the respondent had any connection with the arrest made at his place of business, nor does it impute to him or any of his employees any wrongdoing or condonation of wrongful conduct. Certainly, the words complained of do not charge the

respondent with any crime, nor with the operation of a disorderly place of business. The allegations of the complaint fall far short of implying or alleging that the published article charged the respondent with any misconduct, by reason of the fact that there had been two fights at his place of business. The published article does charge that those who participated in the fight were guilty of disorderly conduct. The article, as published, was not libelous *per se*. It is true that the complaint alleges that the publication intended to injure the plaintiff and his business, but such allegation does not make the publication actionable. We know of no precedent, and none has been cited to us, which makes the publication of the fact that a fight took place between parties at the place of business of a merchant libelous *per se* as to him. The allegation of the complaint that the publication was libelous and that it injured the respondent and his business is the statement of a legal conclusion and not of a fact.

Since we have now held that the publication was not
5 libelous *per se*, the complaint must be examined to determine whether there is any allegation of special damage or extrinsic facts and circumstances which would make the published article libelous. We think not. We point out that there is no allegation that the respondent lost any customers, or had any diminution in trade. There is no allegation of special damages for losses sustained by reason of the publication of the alleged libelous statement. In short, the complaint does not allege special damages.

It is our conclusion, under the principles stated in the foregoing cases, that the article published by the appellant was not libelous *per se*, and there being no allegations in the complaint of special damages, and no extrinsic circumstances alleged, which makes the words libelous, no cause of action was stated by the respondent against the appellant in the complaint. The demurrer should have been sustained.

The record shows that the appellant duly filed notice of intention to appeal to this Court from the order of the Trial

Judge overruling the demurrer to the amended complaint. While the appeal to this Court was pending, the respondent moved to further amend his complaint by alleging special damages, and such motion was granted by the Trial Judge by his order dated December 1, 1960. The appellant asserts that the notice of appeal to this Court from the order dismissing the demurrer to the amended complaint stayed all proceedings in the lower Court until we had heard and disposed of such appeal.

An interlocutory appeal may be taken to this Court
6 from an order overruling a demurrer to a complaint on the ground that it failed to state a cause of action. *Woods v. Rock Hill Fertilizer Co.*, 102 S. C. 442, 86 S. E. 817; *Crotts v. Fletcher Motor Co. et al.*, 219 S. C. 204, 64 S. E. (2d) 540; *Mullis et al. v. Celanese Corp of America*, 234 S. C. 380, 108 S. E. (2d) 547.

Section 7-422 of the 1952 Code of Laws, provides:

"* * * that an appeal from a judgment or decree overruling a demurrer shall stay the further hearing of the cause unless the presiding judge shall be satisfied that the ends of justice will be subserved by proceeding with the trial and shall order the trial of the cause to proceed to judgment *and provided, further*, that nothing contained in the preceding proviso shall be construed to prevent a review upon appeal from the final order or judgment in the cause of any judgment or decree on demurrer."

In the case of *Hammond v. Port Royal & Augusta Ry. Co.*, 15 S. C. 10, the defendant interposed a demurrer to the second of the two causes of action set forth in the complaint. The Trial Judge overruled the demurrer, and the defendant at once gave notice of intention to appeal, and moved the Court to proceed no further with the trial of the second cause of action. The motion was refused and the case ordered to trial. The Supreme Court held that the notice of appeal from the order overruling the demurrer to the second cause of action suspended the proceeding as to that cause of action until the appeal was decided.

In the case of *Elliott v. Pollitzer*, 24 S. C. 81, the defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The Trial Judge overruled the demurrer and the defendant at once gave notice of intention to appeal to the Supreme Court, and requested that the case be continued until the appeal could be heard. The Court refused the request and submitted the case to the jury. This Court decided that the notice of appeal from the order overruling the demurrer to the complaint operated as a *supersedeas*, and stayed the further hearing of the cause on circuit until a decision was made on the appeal.

After the decision in the two above cited cases and 7 similar cases, the General Assembly amended what is now Section 7-422 of the 1952 Code of Laws by adding the proviso above quoted, and by the terms thereof an appeal from a judgment overruling a demurrer stays the further hearing of the cause unless the Presiding Judge shall be satisfied that the ends of justice will be subserved by proceeding with the trial, and shall order the trial of the cause to proceed to judgment. An examination of the order of the Trial Judge overruling the demurrer to the amended complaint does not show that he found that the ends of justice would be subserved by proceeding with the trial; nor did he order the trial of the cause to proceed to judgment. Hence, the appeal stayed any further hearing in the cause. It was error, therefore, for the Trial Judge to take any further steps in the action during the continuance of the stay. *Steele v. Atlantic C. L. Ry. Co.*, 96 S. C. 460, 81 S. E. 144; *Melton v. Walker et al.*, 209 S. C. 330, 40 S. E. (2d) 161.

The Trial Judge was, therefore, in error in granting the order of December 1, 1960, because the appeal to this Court from the order overruling the demurrer to the amended complaint was pending, which acted as a stay to further proceedings in the case.

In view of the conclusions that we have reached, it becomes unnecessary to consider the other questions asserted by the appellant.

The judgment appealed from is reversed and the lower Court is directed to sustain the demurrer interposed by the appellant to the amended complaint.

Reversed.

TAYLOR, Acting Chief Justice, OXNER and LEGGE, JJ.,
and STEVE C. GRIFFITH, Acting Associate Justice, concur.

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